IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-418

ASH GROVE CEMENT COMPANY,

Petitioner

v.

FEDERAL TRADE COMMISSION

PETITION (WITH APPENDIX) FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Ash Grove Cement Company petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit affirming the Federal Trade Commission's order.

OPINIONS BELOW

The Opinion of the court below, set forth at Pet. App. 35a, is reported at 577 F.2d 1368. The order of the court denying Ash Grove's petition for rehearing and suggestion for rehearing *en banc is* set forth at Pet. App. 55a. The Opinion and order of the Federal Trade Commission (Pet. App. 1a) are reported at 85 F.T.C. 1123. The Commission's order denying Ash Grove's petition for reconsideration (Pet. App. 33a) is reported at 86 F.T.C. 606.

JURISDICTION

The judgment of the court of appeals was entered on May 23, 1978 (Pet. App. 35a). Petition for rehearing filed by Ash Grove was denied on July 13, 1978 (Pet. App. 55a). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

The Federal Trade Commission has entered an order requiring Ash Grove to divest two Kansas City ready-mixed concrete companies which the Commission found unlawfully acquired in violation of Section 7 of the Clayton Act. However every material fact found against Ash Grove had previously been extensively investigated and decided by the Commission during a rulemaking proceeding to enforce Section 7 of the Clayton Act with respect to vertical mergers in the cement industry. The court below affirmed the Commission's order, finding that the agency had authority to enforce Section 7 of the Clayton Act entirely or in part by rulemaking proceeding. The following questions arise:

1. Whether the Federal Trade Commission has statutory authority to enforce the antimerger law, Section 7 of the Clayton Act, by a legislative rulemaking ("trade regulation rule") proceeding,[1] rather than by case-by-case adjudication.

2. Whether the Commission enforced Section 7 of the Clayton Act against Ash Grove by a trade regulation rule proceeding.

3. Whether the court below applied an erroneous standard

[1] Substantive "rulemaking" proceedings conducted by the Federal Trade Commission are referred to as "trade regulation rule" proceedings. The two terms are used interchangeably in this brief to refer to proceedings whereby a statutory standard is formulated in whole or part through legislative rather than adjudicative procedure.

of statutory construction in holding that the Commission's rulemaking proceeding was "fully authorized by law" simply because no statute forbids such enforcement of Section 7 (Pet. App. 45a).

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The Fifth Amendment to the Constitution provides, in pertinent part:

> No person . . . shall be . . . deprived of life, liberty or property, without due process of law . . .

Sections 7, 11(a) and 11(b) of the Clayton Act, 38 Stat. 731, 734, as amended, 15 U.S.C. §18, 21(a) and 21(b) provide, in pertinent part:

> SEC. 7 . . . no corporation engaged in commerce shall acquire . . . the whole or any part of the stock . . . of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.
>
> * * *
>
> SEC. 11(a) . . . authority to enforce compliance with Sections 2, 3, 7, and 8 of this Act . . . is hereby vested in the . . . Federal Trade Commission where applicable to all other character of commerce to be exercised as follows:
>
> (b) Whenever the Commission . . . shall have reason to believe that any person is violating or has violated any of the provisions of Sections 2, 3, 7, and 8 of this Act, it shall issue and serve upon such person . . . a complaint stating its charges in that respect, and containing a notice of hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. The person so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered

by the Commission . . . requiring such person to cease and desist from the violation of the law so charged in said complaint.

* * *

Sections 7(c) and 7(d) of the Administrative Procedure Act, 60 Stat. 241 as amended, 5 U.S.C. §§556(d) and (e), provide, in pertinent part:

> A sanction may not be imposed or rule or order issued, except on consideration of the whole record*** (e) The transcript of testimony and exhibits together with all papers and requests filed in the proceeding, constitutes the exclusive record for decision . . .

STATEMENT

Portland cement combines with water, sand and gravel to make concrete, which may be mixed and distributed to construction sites by ready-mix concrete producers. Commencing in the early 1960's, several cement companies acquired ready-mix producers, thereby offering vertically integrated service and efficiencies to consumers (*see* Pet. App. 34a, 27a). Although the acquired companies never accounted for more than 1% of all ready-mix producers, the Federal Trade Commission determined in 1964 to resolve the legality of such mergers under Section 7 of the Clayton Act by an industry-wide trade regulation rule proceeding.[2] This is the first case to challenge the Commission's attempt to enforce one of the antitrust laws, Section 7 of the Clayton Act, by a rulemaking proceeding.

[2] In recognition that the problem of vertical integration in the cement industry through merger is of growing importance and urgency and has apparently assumed industry-wide dimensions, *the Commission has determined forthwith to institute a Trade Regulation Rule proceeding for the study and consideration of this problem.* . . . Where a problem involves an entire industry, made up of a large number of firms, it may be uneconomical, inefficient and inequitable to proceed exclusively on the basis of individual adjudicative proceedings. Industry-wide problems require, so far as is practicable, industry-wide solutions. *We think a rule-making proceeding is particularly appropriate in dealing with such Section 7 problems as are here presented in the cement industry.* Such a proceeding affords a better forum than do adjudicative proceedings against individual companies for organizing and appraising the general economic facts involving industry and market structure that are so important under Section 7 (Permanente Cement Co. 65 F.T.C. 410, 494 (1964); italics added).

(a) The Commission's Trade Regulation Rule Proceeding

A violation of Section 7 of the Clayton Act is proved by showing with respect to the combination of two corporations by stock or assets acquisition or merger:

1) that there will be a reasonable probability of a substantial lessening of competition (*United States v. Marine Bancorporation, Inc.*, 418 U.S. 602, 622-23 (1974));

2) in the relevant product markets (*United States v. General Dynamics Corp.*, 415 U.S. 486, 510-11 (1974));

3) within the relevant geographic market (*United States v. Connecticut National Bank*, 418 U.S. 656, 666-72 (1974)).

The Commission's 1964-67 rulemaking proceeding was undertaken to assemble complete factual answers to every issue of ultimate fact required to determine the legality of cement mergers under Section 7, including:

> information 'on pertinent matters such as the structure of the [1] cement-producing and principal [2] cement-consuming industries, [3] the nature of the relevant product and geographical markets, [4] the causes and business reasons underlying such acquisitions in these industries, and [5] *the probable effects of such acquisitions on competitive conditions of the markets involved*' (FTC Notice of Public Hearing on Vertical

Integration in the Cement Industry, 31 Fed. Reg. 6285, 6286, April 22, 1966; italics added).

Following an industry-wide investigation and a 1966 Staff *Economic Report*, the five members of the Federal Trade Commission held legislative hearings on these issues and then published, in 1967, an *Enforcement Policy* [3] which stated the Commission's conclusions as to each of the factual issues it would have to determine in any subsequent adjudicative cement merger proceeding, including:

1) the relevant product markets: concluded to be portland cement and ready-mixed concrete;

2) the relevant geographic market: concluded to be metropolitan areas, specifically including the Kansas City area;[4]

3) the probable anticompetitive effects, including that the Kansas City area had already been 32% foreclosed by vertical integration [5] and that mergers the size of Ash Grove's (companies purchasing more than 50,000 barrels of cement annually) had mani-

[3] *FTC Economic Report on Mergers and Vertical Integration in the Cement Industry* (1966) [herein cited as *Economic Report*]. The *Economic Report* was submitted by the Commission's staff to the Commission on April 4, 1966 and transmitted by the Commission to the President of the Senate on April 16, 1966 (Economic Report at iii, v). The Commission held hearings on its *Economic Report in* July, 1966 and thereafter on January 3, 1967 issued its *FTC Enforcement Policy with Respect to Vertical Mergers in the Cement Industry* [herein cited as *Enforcement Policy*]. The 1966 *FTC Economic Report* and the 1967 *FTC Enforcement Policy* are official government records comprising the acts, proclamations and publications of the Federal Trade Commission, and as such are proper subjects for judicial notice. Petitioner has lodged with the clerk certified copies of the 1966 *FTC Economic Report* and of the 1967 *FTC Enforcement Policy.*

[4] *See, e.g., Economic Report* at 26, 29; *Enforcement Policy* at 3-7.

[5] *See, e.g., Economic Report* at 99.

fest adverse competitive effects [6] and would be ordered divested.

(b) The Federal Trade Commission Order

The Commission order affirmed by the ninth circuit was entered in an "adjudicative" case decided after the rule-making proceeding was concluded. The Commission's order against Ash Grove is accompanied by an opinion which presents the same conclusions the Commission had already reached in its legislative rule-making proceeding, namely,

1) that the relevant product markets were portland cement and ready-mixed concrete (Pet. App. 5a);

2) that the relevant geographic market was the Kansas City standard metropolitan statistical area (Pet. App. 10a);

3) that probable anticompetitive effects were likely to occur as a result of Ash Grove's acquisition of two ready-mix companies accounting for 10.2% and 3.1% of the ready-mixed concrete sold in Kansas City SMSA [7] in 1966 and that as a result of these *and other acquisitions by other companies*, 40% of the Kansas City SMSA portland cement "market" had been "captured" by vertical integration (Pet. App. 17a).

In its opinion the Commission rejected Ash Grove's contentions [1] that all the material issues of fact had been previously investigated and decided in the legislative rule-

[6] *See, e.g., Economic Report* at 15. *See also Economic Report* at 104-110; *Enforcement Policy* at 1-2, 7.

[7] That is the "standard metropolitan statistical area," a six county area delineated by the Office of Management and Budget based on concentrations of urban population and the commuting pattern of residents (United States v. Connecticut National Bank, 418 U.S. 656, 670 (1974)).

making proceeding, [2] that the rulemaking proceeding was not authorized by any law and [3] that the Commission had enforced Section 7 of the Clayton Act *not* by adjudication, but by and through an *ultra vires* legislative rule-making proceeding.

However, the Commission's adjudicative complaint simply parroted the key findings already made in the rule-making proceeding. Moreover, documentary and testimonial evidence in the "adjudicative" proceeding was ruled discoverable, admissible or reliable only to the extent it was consistent with the conclusions the Commission had already reached in the rulemaking proceeding. So absolutely did the Commission relinquish its judicial function in favor of the markets and anticompetitive effects legislatively found in its rulemaking proceeding that since the *Enforcement Policy* was promulgated in 1967, the Commission has found a violation of Section 7 in every subsequently litigated cement case.[8] In doing so, the Commissioners overturned their own trial judge's *dismissals* of three complaints,[9] and in two of five litigated cases did so in express reliance on the conclusions already reached in their own *Economic Report*.[10]

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[8] Marquette Cement Mfg. Co. 75 F.T.C. 32 (1969); Mississippi River Corp. 75 F.T.C. 813 (1969), *aff'd* 454 F.2d 1083 (8th Cir. 1972; OKC Corp. 77 F.T.C. 1342 (1970), *aff'd* 455 F.2d 1159 (10th Cir. 1972); United States Steel Corp. 74 F.T.C. 1270 (1968), *rev'd* 426 F.2d 592 (6th Cir. 1970), 81 F.T.C. 629 (1972); Ash Grove Cement Co. 85 F.T.C. 1123, 86 F.T.C. 606 (1975), *aff'd* 577 F.2d 1368 (9th Cir. 1978).

[9] Marquette Cement Mfg. Co. 75 F.T.C. 32 (1969); Mississippi River Corp. 75 F.T.C. 813 (1969); U.S. Steel Corp. 74 F.T.C. 1270 (1968). All three cases are cited in support of the Commission's opinion in *Ash Grove* (Pet. App. 6a & n. 17, 13a & n. 42, 14a & n. 47, 15a & n. 50).

[10] Marquette Cement Mfg. Co. 75 F.T.C. 32, 98-100 & n. 25 & 31 (1969); Mississippi River Corp. 75 F.T.C. 813, 908, 910-11 (1969). Both opinions are cited in support of the Commission's opinion in *Ash Grove* (Pet. App. 6a & n. 17, 14a & n. 4., 15a & n. 50).

Any doubt that the order affirmed below merely implemented the conclusions of the rule-making proceeding will be dispelled by examining the *Addendum* immediately following this petition. The *Addendum* shows, point-by-point, how each allegation of the complaint issued against Ash Grove in 1969 had already been prejudged by the conclusions *reached by* the Commission in its 1964-67 rulemaking proceeding.

(c) The Court of Appeals Opinion

By reason of substantial business conducted within the Pacific Northwest and California, Ash Grove filed a petition for review of the Federal Trade Commission's order with the United States Court of Appeals for the Ninth Circuit. On May 23, 1978, the court below affirmed the order issued by the Commission (Pet. App. 1a). The court found "incorrect" Ash Grove's contention "that the Commission was without authority to conduct investigations through the medium of a trade regulation rule proceeding *and utilize the expertise and information obtained thereby in subsequent adjudicative enforcement proceedings*" to enforce Section 7 of the Clayton Act (Pet. App. 42a-43a; italics added).

That the Commission chose not to issue a formal rule was deemed irrelevant because the court held [1] that nothing in Section 11(b) *prohibited* enforcement of Section 7 of the Clayton Act by a trade regulation rulemaking proceeding, [2] that such a proceeding was "fully authorized by law" and [3] that

> Once such proceedings are concluded the Commission can proceed to issue a trade regulation rule, can determine no rule is necessary and culminate its efforts, or, can simply issue a policy statement as an industry guide. (Pet. App. 45a).

The court also found that "the fact that some of the

Commissioners' conclusions expressed in the Enforcement Policy were mirrored in the complaint does not prove prejudgment" — noting that not all Commissioners sat in both proceedings (Pet. App. 46a & n. 11), labelling the *Enforcement Policy* conclusions as "tentative" (Pet. App. 46a) and presuming regularity from the Commission's allegedly "self-serving statements that it will judge each case on its individual merits" (Pet. App. 47a).

REASONS FOR GRANTING THE WRIT

This case presents the novel and important question whether the Federal Trade Commission does have statutory authority to enforce one of the antitrust laws, Section 7 of the Clayton Act, by a legislative rulemaking proceeding. The court below effectively affirmed such power in the Commission, even though the power itself, the procedural rights attendant upon its invocation, and judicial review of its implementation are nowhere provided for by any statute.

Review by this Court is sought to correct the lower court's erroneous disregard of the long established doctrine of this Court that all agency action must be justified by some law (*see e.g., Leedom v. Kyne*, 358 U.S. 184, 188-89 (1958)). The case also presents clear error of statutory construction in that a rulemaking power applicable solely to the Federal Trade Commission Act was applied to the Clayton Act. Finally, the court below erred in alternatively holding that Section 7 was enforced against Ash Grove in an adjudicative proceeding uninfluenced by the Commission's prior rulemaking proceeding.

First, this is a case of first impression. It is the only case to challenge before any court the Federal Trade Commission's sole attempt to enforce Section 7 of the Clayton Act by rulemaking proceeding. On the reasoning of the court below, such a power could be claimed to extend to all statutes enforced by the FTC. Since this is a matter of considerable concern to all parties which may be subject to FTC regulation, it should be resolved by this Court.

Second, the court below effectively affirmed a rulemaking power in the Federal Trade Commission to enforce Section 7 of the Clayton Act simply because nothing in the Clayton Act expressly forbids such power:

> Nothing in either the statute or the regulations prohibits the FTC from conducting investigations through authorized trade regulation proceedings. *See* 15 U.S.C. §46(a); 16 C.F.R. §§1.5, 1.6, 2.8 (Pet. App. 45a).

The fact is that nothing in the Clayton Act nor any other statute *authorizes* rulemaking under Section 7 of the Clayton Act, either expressly or implicitly.[11]

Because *no* statute authorizes such power, the court's opinion cannot and does not identify any such statute, contrary to the fundamental rule of administrative due process that all agency action must be specifically authorized by some law [12] (*American School of Magnetic Healing v. McAnnulty*, 187 U.S. 94, 108 (1902)). The principle that all agency acts must be justified by some law has been consistently applied by the Court for over 75 years since its 1902 *McAnnulty* decision (*see, e.g., United States v. Idaho*, 298 U.S. 103, 109 (1936); *Stark v. Wickard*, 321 U.S. 288, 307 (1944); *Leedom v. Kyne*, 358 U.S. 184, 188-89 (1958); and *Schilling v. Rogers*, 363 U.S.

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[11] The Court's May 23, 1978 Opinion (Pet. App. 43a-45a) refers particularly to section 11(b) of the Clayton Act (15 U.S.C. §21(b)), which refers to *adjudication*, not rulemaking as the only authorized mode of enforcing Section 7. The other authorities cited deal with voluntary industry guides or with general or *adjudicative* investigatory powers or procedures — none of which are relevant.

[12] Contrary to its ruling in this case, the court below held in F.M.C. v. Anglo-Canadian Shipping Co., 335 F.2d 255 (9th Cir. 1964) that agencies can exercise only those powers *specifically granted and expressly authorized* by Congress.

666, 676-77 (1960)). The principle is statutorily embodied in the Administrative Procedure Act which in Section 9 flatly enjoins the issuance of *any* agency order "except within jurisdiction delegated to the agency and as authorized by law" (5 U.S.C. §558(b) (1970)).

Third, the failure of the court below to identify any statute which purportedly authorizes rulemaking power in the Commission to enforce Section 7 of the Clayton Act is due to the court's misplaced reliance on *National Petroleum Refiners Ass'n. v. F.T.C.*, 482 F.2d 672 (D.C. Cir. 1973), *cert denied,* 415 U.S. 951 (1974) which held that the FTC does have a specific rulemaking power to enforce the *Federal Trade Commission Act* with respect to false advertising and other unfair or deceptive consumer practices. But the *Petroleum Refiners* decision is based on a statutory rulemaking power found in Section 6(g) *of the FTC Act* [15 U.S.C. §46(g) (1970)] and expressly limited to that Act. There is *no* Section 6(g) *nor* any remotely comparable statutory provision relating to Section 7 of the Clayton Act.

The court below failed to perceive this crucial distinction and thus applied an erroneous standard of statutory construction by viewing the similar failure of Section 11(b) of the Clayton Act and Section 5(b) of the FTC Act [15 U.S.C. §45(b) (1970)] to prohibit rulemaking, as authorizing rulemaking under both the Clayton and FTC Acts. But as noted, the FTC Act *does* have a separate rulemaking provision authorizing rulemaking under, and limited to, the FTC Act. The Clayton Act has no such provision and rulemaking is not authorized to enforce Section 7 of the Clayton Act.

Fourth, the court below erred in applying the *Withrow v. Larkin,* 421 U.S. 35, 47 (1975) presumption of regularity in rejecting Ash Grove's claim that the Commission enforced Section 7 of the Clayton Act by a trade regulation rule proceeding. If Section 7 can be enforced *only* through

adjudicative proceedings, then the presumption is clearly rebutted since the court below found that the Commission not only investigated violations of Section 7 by a rulemaking proceeding (Pet. App. 45a), but also that many of the conclusions of the staff *and of the Commissioners* in the rulemaking proceeding were "mirrored" in the subsequent complaint against Ash Grove (Pet. App. 46a).

However, the record shows beyond doubt that the Commission *did* enforce Section 7 of the Clayton Act by a rulemaking proceeding. The "conclusions" of the rulemaking proceeding were neither "tentative" (Pet. App. 46a) nor their authors possessed of "open minds" (Pet. App. 42a & n. 8).

During the adjudicative proceeding, discovery was limited to the product and geographic markets already determined by the Commission in its rulemaking proceeding to be the relevant markets for applying Section 7 to cement mergers. The Commission's opinion turns largely on geographic market "foreclosure." Thus, merely the predetermination that the relevant geographic market was metropolitan areas, rather than regional multi-state areas, foreordained the outcome of the adjudicative case before the adjudicative complaint ever issued.[13]

Similarly without substance is the Court's reference to the fact that not all of the Commissioners who decided the adjudicative case participated in the Trade Regulation Rule Proceeding (Pet. App. 46a and n. 11). The Commission is a continuing collegial body and it matters not whether prejudice be found in one or all members. *Amos*

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[13] This Court has recognized the importance of realistic market definition in Section 7 cases. In the rulemaking and adjudicative proceedings the Commission relied on arbitrary "standard metropolitan statistical areas," which this Court found inadequate for the far more localized banking industry in United States v. Connecticut National Bank, 418 U.S. 656, 670 (1974).

Treat & Co. v. S.E.C., 306 F.2d 260, 264 (D.C. Cir. 1962), quoting *Berkshire Employees Ass'n. v. National Labor Relations Board*, 121 F.2d 235, 238-39 (3d Cir. 1941):

> "One of these essential [of fair play] is the resolution of contested questions by an impartial and disinterested tribunal *** The Board argues that at worst the evidence only shows that one member of the body making adjudication was not in a position to judge impartially. We deem this answer insufficient. Litigants are entitled to an impartial tribunal whether it consists of one man or twenty and there is no way which we know of whereby the influence of one upon the others can be quantitatively measured."

In fact, Commissioner Thompson, who did not participate in the rulemaking proceeding, commented in a dissenting statement to the adjudicative opinion: "Nor is it an adequate answer to say that, *whatever the wisdom of the choice we made in 1966*, the costs associated with them are 'sunk' now and thus should be ignored" (Pet. App. 25a).

The clear import of this statement is that the Commission in fact determined in 1966 during its legislative rulemaking proceeding that vertical cement mergers of the nature and size of Ash Grove's acquisitions violated Section 7 of the Clayton Act, and that the FTC majority in 1975 had deemed itself bound to follow its 1966 decision by ordering the divestiture of Ash Grove's acquisitions.

CONCLUSION

Accordingly, this petition for writ of certiorari should be granted.

Respectfully submitted,

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ADDENDUM

ADDENDUM *

Showing point-by-point how each allegation of the complaint issued against Ash Grove in 1969 had already been prejudged by the conclusions reached by the Commission in its 1964-67 rulemaking proceeding.

I.

ANTICOMPETITIVE EFFECTS

ALLEGATION OF THE COMPLAINT ISSUED AGAINST ASH GROVE IN 1969

"21. Portland cement manufacturers sell their portland cement to consumers such as ready mixed concrete companies, concrete product manufacturers, contractors and building material dealers. On a national basis, approximately 60% of all portland cement is shipped to firms engaged in the production and sale of ready mixed concrete."

CONCLUSIONS OF THE TRADE REGULATION RULE PROCEEDING REACHED IN 1964 THROUGH 1967

"Out of a total 1964 cement production in the United States of 368,633,000 barrels, *ready-mixed concrete companies purchased about 60 percent.* (*Enforcement Policy* at p. 6). *The balance of cement supply is purchased by concrete products manufacturers, contractors, and building and materials dealers*" (*Economic Report* at p. 1 n. 1).

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* Italics are added in quotations appearing in this addendum.

(I. ANTICOMPETITIVE EFFECTS, CON'T.)

COMPLAINT ALLEGATION (CON'T.)

"However, in heavily populated metropolitan areas, the percentage of portland cement consumed by ready mixed concrete companies is generally higher."

RULEMAKING CONCLUSION (CON'T.)

"The importance of the ready-mixed concrete firms as cement consumers is even greater in metropolitan centers where there is reason to believe that they account for 70 percent or more of cement purchases" (*Enforcement Policy* at p. 6).

COMPLAINT ALLEGATION (CON'T.)

"In general, portland cement consumers have not been integrated or affiliated with portland cement manufacturers. Each has operated independently on a vendor-vendee basis."

RULEMAKING CONCLUSION (CON'T.)

"Prior to 1960 there was little vertical ownership combining cement production and its leading market ready-mixed concrete" (*Economic Report* at p. 91).

ALLEGATION OF THE COMPLAINT ISSUED AGAINST ASH GROVE IN 1969

"22. In recent years, there has been a significant trend of mergers and acquisitions by which ready mixed concrete companies in major metropolitan markets in various portions of the United States have become integrated with portland cement companies."

(I. ANTICOMPETITIVE EFFECTS, CON'T.)

CONCLUSIONS OF THE TRADE REGULATION RULE PROCEEDING REACHED IN 1964 THROUGH 1967

"Beginning in the late nineteen-fifties a trend of acquisitions of leading ready-mixed concrete producers by cement manufacturers began which now threatens to transform the structures of both industries" (*Enforcement Policy* at p. 1).

COMPLAINT ALLEGATION (CON'T.)

"Since 1959, there have been at least 40 such acquisitions."

RULEMAKING CONCLUSION (CON'T.)

"By the end of 1965 no fewer than 40 ready-mixed concrete companies had been acquired by leading cement companies . . ." (*Enforcement Policy* at p. 1).

ALLEGATION OF THE COMPLAINT ISSUED AGAINST ASH GROVE IN 1969

"23. Each vertical merger or acquisition which occurs in the portland cement industry potentially forecloses competing portland cement manufacturers from a segment of the market otherwise open to them."

CONCLUSIONS OF THE TRADE REGULATION RULE PROCEEDING REACHED IN 1964 THROUGH 1967

"In each area studied it appears that a substantial portion of the market *has been foreclosed* to other suppliers. Such foreclosure tends to affect competition in several ways" (*Economic Report* at p. 14).

(I. ANTICOMPETITIVE EFFECTS, CON'T.)

COMPLAINT ALLEGATION (CON'T.)

"and places great pressure on competing manufacturers likewise to acquire portland cement consumers in order to protect their markets."

RULEMAKING CONCLUSION (CON'T.)

"Such mergers tend to deprive other suppliers of economical access to the affected markets. *A frequent response of disadvantaged firms is to engage in defensive mergers of their own,* thereby triggering other mergers" (*Economic Report* at p. 14).

COMPLAINT ALLEGATION (CON'T.)

"Thus, each such vertical acquisition may form an integral part of a chain reaction of such acquisitions — contributing both to the share of the market already foreclosed, and to the impetus for further such acquisitions."

RULEMAKING CONCLUSION (CON'T.)

"Acquisitions of leading cement consumers in markets containing comparatively few volume buyers may have the effect of substantially disrupting the competitive situation at the cement level, and, in fact, *may set off a 'chain' reaction of acquisitions*" (*Enforcement Policy* at p. 7)

ALLEGATION OF THE COMPLAINT ISSUED AGAINST ASH GROVE IN 1969

"24. In the Kansas City area the trend toward vertical integration is well advanced. Four of the leading ready mixed concrete sellers and portland cement consumers in this area have become integrated with portland cement companies since 1963

(I. ANTICOMPETITIVE EFFECTS, CON'T.)

COMPLAINT ALLEGATION (CON'T.)

through acquisition. More than 50% of the market for portland cement in the Kansas City area has been potentially foreclosed by vertical integration."

CONCLUSIONS OF THE TRADE REGULATION RULE PROCEEDING REACHED IN 1964 THROUGH 1967

"In most urban centers, the ready-mixed concrete industry is quite concentrated. For example, the four largest ready-mixed concrete companies doing business in . . . *Kansas City* . . . made approximately 50% or more of the concrete sales in those cities" (*Enforcement Policy* at p. 6).

RULEMAKING CONCLUSION (CON'T.)

"In each area studied [*one of which was Kansas City see, e.g., Economic Report* at pp. 48-49], it *appears that a substantial portion of the market has been foreclosed to other suppliers*" (*Economic Report* at p. 91).

RULEMAKING CONCLUSION (CON'T.)

[The *Economic Report* at pp. 98-99 specifically finds that Kansas City metropolitan area has been 32% foreclosed by vertical integration].

ALLEGATION OF THE COMPLAINT ISSUED AGAINST ASH GROVE IN 1969

"25. The effect of the acquisitions of Fordyce and Lee's Summit and their merger into one operation and the acquisition of the assets used in the operation of Union Quarries, both in themselves and by aggravating the trend of vertical mergers and acquisitions, may be substantially to lessen competition or to tend to create a monopoly in the manu-

(I. ANTICOMPETITIVE EFFECTS, CON'T.)

COMPLAINT ALLEGATION (CON'T.)

facture and sale of (1) portland cement and (2) ready mixed concrete in the United States as a whole and various parts thereof, including the Kansas City area, in the following ways, among others."

CONCLUSIONS OF THE TRADE REGULATION RULE PROCEEDING REACHED IN 1964 THROUGH 1967

"The Federal Trade Commission has concluded that vertical mergers and acquisitions involving cement manufacturers and consumers of cement, particularly ready-mixed concrete companies, can have substantial adverse effects on competition in the particular market areas where they occur" (*Enforcement Policy* at p. 2).

RULEMAKING CONCLUSION (CON'T.)

"On the basis of this study of the structure and competitive character of the cement and concrete industries, it appears that *the merger of any of the larger factors in local concrete markets with a substantial cement supplier in that market would have manifest adverse effects on competitive conduct and performance"* (***Economic Report*** at p. 15).

RULEMAKING CONCLUSION (CON'T.)

"Vertical integration in cement distribution and processing necessarily forecloses a segment of a market to competitors of the integrating firm. Such foreclosure may immediately 'injure' displaced competitors who must operate at a lower rate of capacity" (***Economic Report*** at p. 104).

(I. ANTICOMPETITIVE EFFECTS, CON'T.)

ALLEGATION OF THE COMPLAINT ISSUED AGAINST ASH GROVE IN 1969

"25. (a) Ash Grove's competitors have been and/or may be foreclosed from a substantial segment of the market for portland cement."

CONCLUSIONS OF THE TRADE REGULATION RULE PROCEEDING REACHED IN 1964 THROUGH 1967

"In each area studied [including Kansas City] ***it appears that a substantial portion of the market has been foreclosed to other suppliers.*** Such foreclosure tends to affect competition in several ways" (***Economic Report*** **at p. 14**).

RULEMAKING CONCLUSION (CON'T.)

"Vertical forward acquisitions of large ready-mixed manufacturers do more than merely temporarily disrupt access to cement markets by unintegrated suppliers. Such mergers tend to deprive other suppliers of economical access to the affected markets.*** In this context unrestrained merger activity may freeze some suppliers out of a major segment of the market. The net effect is to shrink the size of the open market for cement. Several adverse competitive effects may flow from this. The number of effective competitors seeking to supply particular markets may be diminished, thereby reducing the intensity of competition" (***Economic Report*** at p. 14).

ALLEGATION OF THE COMPLAINT ISSUED AGAINST ASH GROVE IN 1969

"25. (b) The ability of Ash Grove's non-integrated competitors effectively to compete in the sale of portland cement and ready mixed concrete has been and/or may be substantially impaired."

(I. ANTICOMPETITIVE EFFECTS. CON'T.)

CONCLUSIONS OF THE TRADE REGULATION RULE PROCEEDING REACHED IN 1964 THROUGH 1967

"Unintegrated ready-mixed concrete producers furthermore may be at a disadvantage in competing with rivals who are integrated cement and concrete manufacturers. This is true not only because of disparities in size and access to capital, and the advantages inherent in product and market diversification, but also because of the potential 'price squeeze' latent in competition with integrated companies" (*Enforcement Policy* at p. 7).

RULEMAKING CONCLUSION (CON'T.)

"When one or more major ready-mixed concrete firms are tied through ownership to particular cement suppliers, the resulting foreclosure not only may be significant in the short run, but *may impose heavy long-run burdens on the disadvantaged cement suppliers* who continue selling in markets affected by integration. Acquisitions of leading cement consumers in markets containing comparatively few volume buyers *may have the effect of substantially disrupting the competitive situation at the cement level . . .*" (*Enforcement Policy* at p. 7).

ALLEGATION OF THE COMPLAINT ISSUED AGAINST ASH GROVE IN 1969

"25. (c) The entry of new portland cement and ready mixed concrete competitors may have been and/or may be inhibited or prevented."

CONCLUSIONS OF THE TRADE REGULATION RULE PROCEEDING REACHED IN 1964 THROUGH 1967

"The more extensive vertical integration becomes in the cement and concrete industries, *the higher tends to be the level of entry barriers . . .*" (*Enforcement Policy* at p. 7).

(I. ANTICOMPETITIVE EFFECTS, CON'T.)

COMPLAINT ALLEGATION (CON'T.)

The complaint alleges that in 1966 Fordyce Concrete purchased 299,000 barrels of cement and Lee's Summit purchased 91,000 barrels of cement.

RULEMAKING CONCLUSION (CON'T.)

In its January 17, 1967 *Enforcement Policy,* the Federal Trade Commission "determined . . . to use all the legal weapons at its disposal to proceed against and order the divestiture*** [of] the acquisition of any ready-mixed concrete company, or other cement consumer, which regularly purchases 50,000 barrels of cement or more annually . . ." (*Enforcement Policy* at p. 9). By its *Enforcement Policy* the Commission required advance notification of all cement company acquisitions of ready mix companies, and in its "Policy" the Federal Trade Commission stated that it "shall issue a complaint challenging the acquisition [*inter alia* of any cement consumer of more than 50,000 barrels] under Section 7 of the Clayton Act" (*Enforcement Policy* at pp. 8-10).

II.

THE RELEVANT PRODUCT MARKETS

ALLEGATION OF THE COMPLAINT ISSUED AGAINST ASH GROVE IN 1969

Defined by the complaint [Para. 1(a) and 1(b)] to be (1) *grey portland cement* ASTM types I-V, and (2) *ready mixed concrete,* including central, transit and shrink-mixed concrete, which is delivered in a plastic and unhardened state.

(II. THE RELEVANT PRODUCT MARKETS CON'T.)

CONCLUSIONS OF THE TRADE REGULATION RULE PROCEEDING REACHED IN 1964 THROUGH 1967

The *Economic Report* focuses on cement producers and consumers, finds that 95% of all cement is *grey portland cement* (*Economic Report* at p. 18). that *ready mixed concrete* producers are the largest consumers of cement (*Economic Report* at p. 45) and that ready mixed concrete may be either central or transit mixed ["shrink" mixing is a combination of both processes] which is delivered by trucks to the delivery site (*Id*).

III.

THE RELEVANT GEOGRAPHIC MARKETS

ALLEGATION OF THE COMPLAINT ISSUED AGAINST ASH GROVE IN 1969

Defined by the complaint to be the "Kansas City area" [Para. 1(c)].*

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* Specifically, the "Kansas City area" is defined to include those six counties which comprise the Kansas City Standard Metropolitan Statistical Area. The complaint also alleges in Paragraph 25 that the effect of Ash Grove's acquisitions may be substantially to lessen competition "in the United States and various parts thereof." However, Commission trial counsel did not present any substantial evidence on competitive effects outside the "Kansas City area." *See* Initial Decision, Finding 49 and the Commission's Final Opinion (Pet. App. 6a & n. 17).

(III. THE RELEVANT GEOGRAPHIC MARKETS, CON'T.)

CONCLUSIONS OF THE TRADE REGULATION RULE PROCEEDING REACHED IN 1964 THROUGH 1967

Defined (for *both* ready mixed concrete and cement) by the Trade Regulation Rule *Economic Report* and *Enforcement Policy* to be limited to *metropolitan areas,* including *Kansas City,* which was one of 22 metropolitan areas studied during the Trade Regulation Rule Proceeding:

RULEMAKING CONCLUSION (CON'T.)

"***there may be a number of distinguishable economic markets within the reach of a single [cement] manufacturing facility. *These markets are centered in metropolitan areas* where construction activity and consequent cement demand is most intense."

RULEMAKING CONCLUSION (CON'T.)

"The metropolitan markets tend to be distinct markets; that is, each has unique demand and supply characteristics" (*Economic Report* at p. 26).

RULEMAKING CONCLUSION (CON'T.)

"In New York City, the largest of the *markets,* the leading four producers account for about half and the eight largest for over 70 percent of total shipments. In four other *metropolitan areas*—Cleveland, *Kansas City,* Memphis, and Portland, Oreg., the four largest account for more than 75 percent and the top eight for nearly all shipments" (*Economic Report* at p. 29).

RULEMAKING CONCLUSION (CON'T.)

"***Because urban areas contain concentrations of people and industry, they account for the most intense day-to-day construction activity and consequent cement demand, and thus constitute the choice high-volume centers for cement sales. Cement companies *therefore concentrate their sales effort upon the urban areas.* In recent years, for example, the great majority of over 230 newly constructed cement distribution terminals have been located so as to serve particular metropolitan centers. Distinguishable competitive features usually characterize different urban areas. Different prices generally prevail from one to another, and each is marked by unique supply and demand characteristics. *In summary, metropolitan centers are focal points of cement demand and are regarded by cement companies as key marketing areas. It is within these centers that the effects on competition resulting from vertical acquisitions tend to be most keenly felt.*"

RULEMAKING CONCLUSION (CON'T.)

"Such urban markets, within which vertical mergers and acquisitions take place, are often highly concentrated on both the supply and demand sides" (*Enforcement Policy* at pp. 3-4).

RULEMAKING CONCLUSION (CON'T.)

"***Concrete is normally not transported more than five to ten miles from production site to the construction job of the purchaser. *Any given metropolitan*

RULEMAKING CONCLUSION (CON'T.)

area would therefore appear to be a definitive market for concrete production and sale, and it is not likely that there are any outside suppliers actually or potentially available. In most urban centers, the ready-mixed concrete industry is quite concentrated. For example, the four largest ready-mixed concrete companies doing business in . . . Kansas City . . . made approximately 50 percent or more of the concrete sales in those cities.***"

RULEMAKING CONCLUSION (CON'T.)

"In any given metropolitan market ready-mixed concrete producers are therefore dominant cement consumers and constitute the crucial link in cement distribution and use" (*Enforcement Policy* at pp. 5-6, 7).

APPENDIX

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

COMMISSIONERS:

Lewis A. Engman, Chairman

Paul Rand Dixon

Mayo J. Thompson

M. Elizabeth Hanford

Stephen Nye

In the Matter of
ASH GROVE CEMENT COMPANY,
a corporation

DOCKET NO. 8785

OPINION OF THE COMMISSION

By Hanford, Commissioner:

This matter is before us on respondent's appeal from the Initial Decision of the Administrative Law Judge, filed September 23, 1974. In that Decision, respondent, Ash Grove Cement Company (Ash Grove), was found to have violated Section 7 of the Clayton Act, as amended, with respect to two separate acquisitions, and Section 5 of the Federal Trade Commission Act, with respect to a third. As to each, divestiture was ordered, along with certain other relief. On appeal, respondent has challenged aspects of the Law Judge's finding's as to liability and remedy in the case of each acquisition. Upon a full review of the record in this proceeding, including extensive briefing and oral argument on appeal, we must modify the Initial Decision and accompanying Order as set forth below.

I

The following factual summary, amply supported by the record, indeed, substantially uncontested, provides a background for our disposition of this case. At the time of the challenged acquisitions, respondent, a Delaware corporation, was principally engaged in the manufacture and sale of lime and portland cement. In varying degrees, the company was marketing its cement in the eight states of Kansas, Missouri, Arkansas, Oklahoma, Texas, Iowa, South Dakota and Minnesota. During the years preceeding the acquisitions, respondent's total average annual shipments were in the 5,000,000 barrel range.[1]

Respondent has sold portland cement in the Kansas City area for well over sixty years. It maintains one of its two portland manufacturing facilities in Chanute, Kansas, and since 1962, it has operated a portland cement transfer station in Kansas City, Kansas.[2] In the years 1961 through 1966, respondent shipped an annual average of some 404,166 barrels[3] of portland cement in the Kansas City metropolitan area (KCMA),[4] ranking consistently among the top-four suppliers. As a percent of total shipments in the area, this volume ranged from 12.8, in 1961, to a pre-acquisition high of 18.0 in 1963; in 1966, the year of the challenged acquisitions, respondent's percent of area shipments was 16.6.[5]

In June, 1964, Ash Grove purchased 50% of the outstanding stock of Fordyce Concrete, Inc. (Fordyce), a

[1] CX 2B. In comparable years, the nationwide total portland cement shipments by all manufacturers annually averaged some 333,932,000 barrels. CX 51 at 6.

[2] The "transfer station," or "distribution terminal," is a producer-controlled local distribution facility of fairly recent advent.

[3] CX 79 and CX 80.

[4] *See* note 17, *infra*.

[5] CX 79 and CX 80.

Kansas corporation engaged in the manufacture and sale of ready-mixed concrete in the Kansas City area since 1961. On November 8, 1966, the respondent purchased the remaining outstanding shares of Fordyce, thereby gaining total ownership.[6] At that time, Fordyce was operating two ready-mixed concrete plants in the area; and, for the fiscal year ending January 31, 1966, the company demonstrated sales of over $2.8 million, with net profits of $34,910, and total assets of $1,259,003. By the end of 1966 Fordyce was the third ranking ready-mixed company in the KCMA, with 14.0 percent of the market in that year.[7] As a leading factor in the ready-mixed market — and the largest, not wholly owned by a cement supplier — Fordyce consumed, in 1966, 10.2 percent of all shipments of portland cement in the market area.[8]

On January 6, 1966, having previously acquired a one-third interest, respondent purchased the remaining outstanding stock in Lee's Summit Ready-Mixed Concrete & Materials Company (Lee's Summit), a Missouri corporation also in the ready-mixed market in the Kansas City area.[9] At that time, Lee's Summit was operating two ready-mixed plants in the KCMA. For the fiscal year ending February 28, 1966, the company demonstrated sales of $1,603,751, with net profits of $21,593, and total assets of $459,750. At the time Ash Grove acquired the remaining stock in Lee's Summit, the ready-mixed company

[6] Ash Grove paid $100,000 for its 1964 purchase of 5,225 authorized but previously unissued shares and, in 1966, paid $300,000 for the then remaining 5,225 shares.

[7] CX 82. In 1964 — the year respondent made its initial stock acquisition in the company — Fordyce was also ranked third, with 13.1 percent of the market.

[8] CX 86.

[9] In 1962, respondent made its initial one-third stock acquisition paying $47,500. The remaining two-thirds were purchased for $200,000.

ranked seventh in its market, with 4.3 percent of sales in 1966.[10] In that year, Lee's Summit consumed 3.1 percent of all shipments of portland cement in the market area.[11] Subsequently, Lee's Summit operations were merged into those of Fordyce with business continuing under the trade name "Fordyce-Summit."

As a part of the Lee's Summit transaction, Ash Grove also acquired certain real property and an extensive array of quarrying equipment.[12] These assets had evidently been those of a corporation, Union Construction Company, owned by the same individuals who held the outstanding stock in Lee's Summit. It would appear that the assets of Union Construction Company had been distributed to the stockholders; they, in turn, sold them to respondent for $1,050,000. The "Union Quarries" operated these assets in the production and sale of crushed stone and portland cement treated baserock in the Kansas City Metropolitan Area. The record reflects that in 1966, "Union Quarries" purchased some 17,890 barrels of portland cement, presumably for use in the production of baserock.[13] These purchases were approximately 0.9 percent of the

[10] CX 82.

[11] CX 86.

[12] It could be argued that Lee's Summit and these "Union Quarries" assets constituted but a single acquisition. Both are incorporated into the same purchase and sale contract; both involved the same parties in the buyer-seller relationships; and, it may well be that the purchase of one served as partial consideration for the sale of the other. Nevertheless, the entire record has been built on the theory, set forth in the Complaint, that the acquisitions were separate; and since our judgment concerning the competitive significance of the "Union Quarries" arrangement would remain unaltered whether viewed separately or together with Lee's Summit, we are inclined to take the pleadings as we find them on this issue.

[13] CX 8-o.

some 2,924,000 barrels of portland cement shipped in the KCMA that year.[14]

On July 8, 1969 the Complaint in this matter was issued charging that "[t]he acquisitions by Ash Grove of Fordyce and Lee's Summit and their merger into one operation constitute separately and collectively violations of Section 7 of the Clayton Act, as amended, and the acquisition of the assets used in the operation of Union Quarries constitutes a violation of Section 5 of the Federal Trade Commission Act."

II

A delineation of relevant product and geographic market(s) is a necessary threshold to analysis and evaluation of the likely impact of an acquisition on competition.[15] In the case before us, the Administrative Law Judge determined that there are two product markets ("lines of commerce") relevant to the issue of liability in each of the challenged acquisitions: (i) the manufacture and sale of portland cement; and (ii) the manufacture and sale of

[14] Subsequent to the acquisition, Ash Grove conveyed these assets to a newly established subsidiary, Union Quarries, Inc., a Missouri corporation. While the record is silent as to the volume of portland cement consumption by that company after the first quarter of 1967, it does reflect that 234 barrels were acquired in the initial 5 months. CX 8-o.

[15] Such a consideration of competitive effect, in turn, provides the base for a determination of legality. Section 7 of the Clayton Act, as amended, provides in relevant part:

> "[N]o corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly." 15 U.S.C. 18.

This focus on competitive impact is, of course, equally applicable to acquisitions challenged under Section 5 of the Federal Trade Commission Act. *See, e.g., Beatrice Foods Co.*, 67 F.T.C. 473 (1965); *Foremost Dairies, Inc.*, 60 F.T.C. 944 (1962).

ready-mixed concrete. We note, as did the Law Judge, that such market definitions have been adopted by the Commission in a number of instances in the past.[16] Additionally, the Law Judge found that the appropriate geographic area ("section of the country") in which to analyze the competitive impact of each acquisition is the "Kansas City metropolitan area" (KCMA).[17] Based upon a consideration of the record, we agree with these conclusions.

Respondent only indirectly challenges the product markets adopted in the Initial Decision, urging essentially that the Administrative Law Judge's conclusions as to "line of commerce" were not based upon an independent consideration of the record.[18] This contention is buttressed solely by reference to language in Findings 33 and 48 of the Initial Decision which points out, *inter alia,* adoption of both lines of commerce is "in accord with" and "supported by" prior administrative and judicial decisions to the same effect.[19] Respondent's position completely ignores the wealth of record evidence supporting the adopted market definitions; moreover, it fails to acknowledge a number of quite specific findings made by the Law Judge leading readily to those definitions.

"The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it." (citation omitted) *Brown Shoe Co. v. United States,* 370 U.S. 294, 325 (1962). In articulating this primary standard, the Supreme Court indicated that even in situations where, by application of this test, a range of products or services might be found to appropriately constitute a broad market for analysis, ". . . within this broad market, well-defined submarkets may exist which, in themselves, constitute product markets for antitrust purposes." The Court provided a number of "practical indicia" for delineating such markets. These include: ". . . industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors." (citation omitted)[20]

[16] *Permanete Cement Co.,* 67 F.T.C. 334 (1965); *Diamond Alkali Co.,* 72 F.T.C. 700 (1967); *U.S. Steel Corp.,* 74 F.T.C. 1270 (1968); *rev'd on other grounds,* 426 F.2d 592 (6th Cir. 1970): *Mississippi River Fuel Corp.,* 75 F.T.C. 813 (1969), *aff'd,* 454 F.2d 1083 (8th Cir. 1972); *Marquette Cement Manufacturing Co.,* 75 F.T.C. 32 (1969); *OKC Corp.,* 77 F.T.C. 1342 (1970), *aff'd,* 455 F.2d 1159 (10th Cir. 1972).

[17] The KCMA is defined, both in the Complaint and by the Administrative Law Judge, as consisting of ". . . the Counties of Cass, Clay, Jackson and Platte, Missouri, and the Counties of Johnson and Wyandotte, Kansas." (Complaint at 1; Initial Decision at 14.) This geographic market, too, has been previously adopted by the Commission. *Mississippi River Fuel Corp., supra,* note 16.

It was additionally alleged in the Complaint that the United States as a whole was, as well, an appropriate geographic area in which to measure the competitive effects of the challenged acquisitions. The Law Judge, however, correctly concluded that the record fails to support such a contention. It is noted that Counsel Supporting the Complaint have not sought to appeal this determination.

[18] We note, in passing, that respondent has cited other "examples" in support of its claim that the Administrative Law Judge generally failed to give the record in this case his independent consideration. *See* Respondent's Appeal Brief at 39-46. We have given this record, now, our own independent evaluation. While differing in certain respects with the Law Judge, we think it clear that his work has been creditable, as well as independent. We view respondent's contentions to the contrary as wholly without merit; thus, we adopt, and incorporate into our final decision, all findings of the Administrative Law Judge not inconsistent with this Opinion.

[19] Initial Decision at 8, 12.

[20] 370 U.S. 294, 325. Such markets within markets are meaningful from an antitrust view "[b]ecause §7 of the Clayton Act prohibits any merger which may substantially lessen competition 'in *any* line of commerce' (emphasis supplied), . . . [I]t is necessary [therefore] to examine the effects of a merger in each such economically significant submarket to determine if there is a reasonable probability that the merger will substantially lessen competition. If such a probability is found to exist, the merger is proscribed." (citation omitted) *Id.*

The manufacture and sale of portland cement was, at the time of the acquisitions, a principal enterprise of Ash Grove, the acquiring firm. This material, a fine gray powder produced by burning and grinding raw materials such as limestone and shale together with gypsum,[21] provides a basic element in the production of concrete. Portland cement is never used in construction by itself; rather, as when used in concrete production, it functions as a binder of aggregates.[22]

As the Administrative Law Judge found, portland cement, while classified with other hydraulic [23] cements such as masonry cement, displays distinguishable physical characteristics. Thus, it is markedly heavier than masonry cement.[24] Portland cement prices are distinct from those of masonry cement.[25] As well, there is no indication in this record that the price of portland cement displays a sensitivity, or responsiveness, to the price of any other type of cement. The production facilities required for the manufacture of portland cement are, as a practical matter, unique for that purpose;[26] and competitors within the industry recognize the product as a separate line of commerce.[27] Highly specialized customers, ready-mixed concrete producers, by far account for the greatest quantity of portland cement sales.[28] Most significantly, portland ce-

[21] CX 41; Transcript at 2103-04.

[22] CX 41E

[23] A "hydraulic" cement is one which hardens when combined with water.

[24] CX 54 at 4; Transcript at 2108.

[25] Transcript at 2205.

[26] CX 41; Transcript at 2112, 2209.

[27] Transcript at 2210, 2313.

[28] As respondent pointed out in its 1966 Annual Report: "Within the eight-state area in which we ship cement, the ready-mixed concrete producers are the largest volume users. Approximately,

ment's end-use as a binder in the manufacture of concrete is, indeed, unique. The Administrative Law Judge determined, and the record is clear, that "[t]here is no practical substitute for portland cement in the manufacture of concrete."[29] In short, the demand for portland cement is a function of the volume of construction activity underway at any given time and is generally inelastic with respect to the price of other related products. This fundamental inelasticity is sufficient, we think, to meet the broad market standard set forth in ***Brown Shoe, supra.*** Furthermore, assuming ***arguendo*** certain other cement types did manifest some cross-elasticity of demand with portland, the presence of virtually all "practical indicia" of a significant antitrust submarket renders the Administrative Law Judge's determination of this issue patently correct.

The facts of record are equally dispositive as to the ready-mixed market. Ready-mixed concrete is produced by combining portland cement with various aggregates, primarily, rock, sand and water. Whether the mixture takes place, in whole or part, in bins and scale hoppers [30] at plant site, or in the revolving-drum trucks so characteristic of the industry, the concrete is mixed to standard strength specifications requiring a given mixture to withstand a specified pressure level. The product tends to be the single item manufactured and sold by ready-mixers;[31] and sales are made principally to construction contractors and sub-

60% of our total cement prduction went to the ready-mix concrete industry. . . ." This was contrasted with direct sales of 23% to state and federal large volume construction projects — Ash Grove's second-largest customer category. CX 18I.

[29] Initial Decision at 7. CX 38G; CX at 7; Transcript 2104, 2202-03, 2602.

[30] Concrete production facilities are specialized and not readily adaptable to other production uses. CX 38F-G.

[31] CX 38D; CX 43 at 32D-2; Transcript at 2441, 2501, 2514-15.

contractors.[32] While some extremely large construction "pours" are competed for by only multiplant producers, in the main, both large and small ready-mixers are considered by their customers, and themselves, to be in competition.[33] Testimony of record indicates that although price is the primary basis of competition among ready-mixers, fluctuations in price are unrelated to price changes in other building materials.[34] In sum, each of these indicia — the peculiar characteristics and uses of ready-mixed concrete; its unique production facilities, specialized vendors and customers; its pricing unrelated to other products; as well as industry and customer recognition of the market — provide abundant support for delineation of the manufacture and sale of ready-mixed concrete as an appropriate line of commerce.

Respondent's arguments with respect to the geographic component of the portland cement market are no more compelling.[35] In essence, respondent contends that the Administrative Law Judge erred in adopting the KCMA as appropriate on the grounds that: (i) not all shipments of portland cement in the KCMA originate there; and (ii) certain firms supplying the KCMA also make shipments to locations outside the delineated area. Both of these contentions are correct; however, the argument they are designed to support fails to adequately consider the controlling standard for geographic market definition, as well as significant evidence of record.

The primary task in defining an appropriate geographic

[32] CX 38W; Trascript at 1682, 1732, 2449.

[33] Transcript at 1818-20, 1863-67, 1922-23, 1937-41, 2504-05, 2522, 2548.

[34] Transcript at 1755, 1856.

[35] Respondent apparently concedes the propriety of the KCMA as an appropriate geographic market for ready-mixed concrete. *See* Respondent's Brief on Appeal at 53.

market for Section 7 purposes is to determine where the competitive effect of the particular merger under scrutiny will be "direct and immediate." *United States v. Philadelphia National Bank*, 374 U.S. 321, 357 (1963). The Supreme Court has observed that "[t]his depends upon 'the geographic structure of supplier-customer relations'."[36] More specifically, the Court has indicated that ". . . the 'area of effective competition in the known line of commerce must be charted by careful selection of the market area in which the seller operates, *and to which the purchaser can practicably turn for supplies*', . . ." *Id.*, at 359. See *United States v. Phillipsburg National Bank and Trust Co.*, 399 U.S. 350, 362 (1970); *Tampa Electric Co. v. Nashville Coal Co.*, 365 U.S. 320, 327 (1961). Thus, a "pragmatic, factual approach"[37] requires consideration of the "demand side" of a market, as well as an analysis of supplier behavior. Only then can the geographic market selected ". . . both 'correspond to the commercial realities' of the industry and be economically significant." (citation omitted)[38]

Respondent's endeavor to expand the geographic market adopted by the Administrative Law Judge ignores facts pertaining to very real limitations on the supply options available to portland cement customers. For example ready-mixers have limited storage capacity for raw materials. As a result, quick delivery from a portland cement supplier is of key importance. The fact that a majority of area suppliers have established production or distribution facilities within the KCMA, at substantial cost, well bears this out. Additionally, apart from crucial time delays

[36] *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 357 (1963). Indeed, this is particularly true in a vertical merger involving analysis of both supplier and customer product markets.

[37] *Brown Shoe Co.*, v. *United States*, 370 U.S. 294, 336 (1962).

[38] *Id.* at 336-7.

involved in shipments from supply facilities more than marginally outside the metropolitan area, the high shipping costs of portland cement, in relation to its low product value per unit weight, soon render incremental distances economically unacceptable.

Respondent's argument does call attention to the behavior of suppliers; however, important facts relating to this aspect of the equation, too, are de-emphasized. Thus, while suppliers did sell outside the KCMA, the importance they, themselves, attached to the metropolitan area is noteworthy. For example, Ash Grove's president testified to the importance of the Kansas City market, characterizing it as a market worth protecting.[39] Highlighting the significance of the market area to suppliers is the fact that by 1965, four major suppliers in the market, including respondent, had established local distribution terminals in order to expedite delivery to area purchasers. Indeed, two suppliers actually had production facilities in the metropolitan area. In 1966, 79.9 percent of all shipments from local distribution terminals were made to destinations within the defined market; moreover, as the Law Judge pointed out, in that year ". . . 72.0 percent of all portland cement shipments to all destinations located within the KCMA were made from the Kansas City area mills of Missouri Portland Cement Company and Lone Star Cement Corporation and the Kansas City area terminals of respondent, Universal Atlas Cement Division of U.S. Steel, General Portland Cement Company and Mississippi River Corporation. (CX 77, 78, 80, Tr. 2677, 3135, 3253)."[40]

[39] CX 39E, R.

[40] Initial Decision at 13-14. We note that a procedure developed recently by Kenneth G. Elzinga and Thomas F. Hogarty, *The Problem of Geographic Market Delineation in Anti-merger Suits,* 18 Antitrust Bull. 45 (1973), demonstrates the need to assess both supply and demand factors to define a geographic market (noted by the Commission previously in *Beatrice Foods Co.,* 81 FTC 481, 524 n. 6 (1972)). Elzinga and Hogarty espouse a concise method of defining geographic markets. According to their analysis, if 75 percent or more of the demand for the product in the selected area is met by suppliers in that area and if 75 percent or more of the supply of the product emanating from the selected area is consumed by users in that area, then the geographic market has been properly defined. To state their test briefly, if little enters an area from outside and little leaves the area from inside, that area is a relevant geographic market.

Thus, we think a balanced analysis of the "commercial realities" of the portland cement market support the adoption of the KCMA as an appropriate "section of the country" for purposes of this case.

III

In the case of each of the challenged acquisitions, Ash Grove, the acquiring firm, assumed ownership of a firm which, in the course of its business, was a purchaser of one of Ash Grove's principal products — portland cement. Acquisitions of customers or potential customers, by suppliers, are categorized as "forward vertical" mergers. The "tying" of a customer to a supplier is always suspect from an antitrust perspective;[41] in the event of merger, a permanent tie is established, and the need for analyzing the competitive effect of such a relationship is all the more acute.

When a supplier gains permanent control over the purchasing decisions of a customer, the basic competitive factors of the free market — price, quality and service — are no longer choice-determinative.[42] As the Supreme Court

[41] *See Brown Shoe Co.* v. *United States,* 370 U.S. 294, 330-31 (1962).

[42] As Commissioner Dixon has observed in analysis of a similar factual situation: "A substantial share of custom in a market may be obtained by a supplier through contractual exclusivity, not through competition based on offerings of price, quality or service. Competitors of the acquiring supplier may be competively disadvantaged through permanent foreclosure of custom once open to competitive bidding." *United States Steel Corp.,* 74 F.T.C. 1270, 1289 (1968).

pointed out in *Brown Shoe*, "The primary vice of a vertical merger . . . is that, by foreclosing the competitors of either party from a segment of the market otherwise open to them, the arrangement may act as a 'clog on competition,' which deprive[s] . . . rivals of a fair opportunity to compete.'" (citation omitted)[43] The Court further stated: "Since the diminution of the vigor of competition which may stem from a vertical arrangement results primarily from a foreclosure of a share of the market otherwise open to competitors, an important consideration in determining whether the effect of a vertical arrangement 'may be substantially to lessen competition, or to tend to create a monopoly' is the size of the share of the market foreclosed."[44]

The foreclosure percentages with respect to both acquisitions of ready-mixers here are of significant proportion. As the Administrative Law Judge found, in 1966, Fordyce consumed 10.2 percent of all portland cement shipments in the KCMA;[45] Lee's Summit, a smaller operation, accounted for 3.1 percent.[46] Yet, while these figures are, indeed, "important considerations" here and can, in no sense, be considered *de minimis*, there is no *per se* rule of illegality in testing a vertical merger under Section 7.[47] Rather, "[w]hether a particular vertical merger is illegal depends on the facts and the market setting in which it occurs."[48]

Foreclosure manifests a particularly anticompetitive character when it occurs as part of a trend toward forward

[43] *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 323-24 (1962).

[44] *Id.* at 328.

[45] Initial Decision at 19. This constituted 14.6 percent of all purchases by ready-mixed companies.

[46] *Id.* This percentage amounted to 4.5 percent of all purchases by ready-mixed companies.

[47] *See Marquette Cement Mfg. Co.*, 75 F.T.C. 32, 103 (1969).

[48] *Id.* at 103-104.

integration in a concentrated market.[49] For example, in such a situation, barriers to entry, often already high, are raised in the supply market. As the percentage of foreclosed transactions grows, less of an open market remains to attract potential competitors of the integrated suppliers. The would-be entrant is thus faced with the choice of: (i) entering at the supply level to compete for a continually shrinking market dominated by oligopolists; (ii) entering at both the supply and customer levels, facing the significantly increased costs integrated entry implies; or (iii) abandoning all thoughts of entering the market. To create this series of options for a potential entrant is clearly to impede entry.[50]

Nor in such a situation are the anticompetive effects of forward integration limited to the supply market. The leverage created in the hands of integrated suppliers can all too readily be put to use to discipline, if not eliminate, enterprises competing only on the customer level. This phenomenon was explained in *Marquette, supra*:

> By narrowing the margin between the price at which they sell cement on the open market and the price at which they sell ready-mixed concrete, the integrated firms can limit the profits and growth of the ready-mixed firm, many of which are small, local companies operating only in the NYMA, or perhaps even drive them out of business. It is, of course, unlikely that the integrated companies would utilize their leverage to drive independent ready-mixed firms out of the market. This kind of overt exercise of market power is unnecessary; nor is it essential that ready-mixed firms be kept in a state of complete dependency. All that is required is that unintegrated firms and prospective entrants be made aware of the ability of the

[49] Brodley, *Oligopoly under the Sherman and Clayton Acts — From Economic Theory to Legal Policy*, 19 *Stan. L. Rev.* 285, 319 (1967.

[50] *See Marquette Cement Mfg. Co.*, 75 F.T.C. 32, 96-97 (1969).

> integrated oligopoly group — whether acting collectively or simply in "follow-the-leader" fashion — to utilize its leverage. The net effect would be to keep any of the independents from competing too aggressively, to maintain prices above competitive levels, to keep out new entrants — in short, to permit the ready-mixed market to function as a highly concentrated oligopoly. (citations omitted)[51]

In 1966, ten portland cement suppliers were serving the KCMA. Four of those firms, including respondent, shared 81.3 percent of the total market.[52] Thus, the KCMA portland cement market was characterized as a highly concentrated oligopoly. Moreover, the Fordyce and Lee's Summit acquisitions were part of a marked trend toward forward integration into the ready-mixed market. Thus, in 1963, a year after Ash Grove's initial investment in Lee's Summit, the Mississippi River Corporation [53] acquired Stewart Sand & Gravel Company, the largest ready-mixer in the KCMA — at the time, consuming some 23.5 percent of all portland cement shipments in the market.[54] The following year, Ash Grove made its initial 50 percent investment in Fordyce, the third largest ready mixer. In 1965, Missouri Portland Cement Company, the long-standing market leader, acquired Botsford Ready Mix Company, the second largest consumer of portland cement among ready-mixers with 12.7 percent of total shipments in the market.[55] In 1968, the Lone Star Cement Corporation, long a leading firm in the portland cement market, integrated by internal expansion into the ready-mixed market at a cost of some $500,000. In short, the Fordyce and Lee's Summit acquisitions took place in the concentrated oligopoly of portland cement manufacture and supply in the KCMA, a market in the process of integrating forward into the manufacture and sale of ready-mixed concrete, the business of its principal customer. Once the Fordyce and Lee's Summit operations had been fully taken over by Ash Grove, integrated suppliers in the market controlled some 58.5 percent of ready-mixed concrete sales in the KCMA [56] and had, by vertical integration, "captured" over 40 percent of the total portland cement market.[57]

[51] *Id.* at 102

[52] The record reflects that while there had been some slight decrease in four-firm concentration in the years preceeding the acquisitions, there was an increase between 1965 and 1966 (CX 93); moreover, at no time in the five year period prior to the acquisitions could the market be characterized as less than "highly concentrated." (CX 94).

[53] While Mississippi River Corp. was not a factor in the supply market prior to the Stewart acquisition, by 1966, having entered as an integrated firm, it ranked among the top four. (CX 93).

[54] CX 85. This figure amounted to 31 percent of all purchases by ready-mixers.

In this context, we conclude that Ash Grove's two ready-mixed acquisitions, in the long run, can have none other than an effect on competition proscribed by Section 7 of the Clayton Act.

We must, however, take a different view of the "Union Quarries" transaction. In 1966, "Union Quarries" was in the business, *inter alia,* of producing and selling portland cement treated base rock. This required making certain purchases of portland cement; and, of course, the extent of those purchases constituted some foreclosure of the overall portland cement market. As pointed out above, the record indicates 1965 purchases by "Union Quarries" of some 17,890 barrels. This amounts to less than 0.9 percent foreclosure.[58] While we do not rule that such a small

[55] CX 86. This was 17.3 percent of total ready-mixer consumption.

[56] CX 82.

[57] CX 86.

[58] Indeed, incomplete data for 1967 suggest a far smaller amount purchased in the year after the acquisition. CX 8-o.

percentage will be in all cases insignificant,[59] the record here fails to demonstrate that in this particular situation any effect on competition, in any market, would be other than *de minimis*.[60] We therefore reject the Administrative Law Judge's conclusion that "[t]he acquisition of the assets used in the operation of Union Quarries by Ash Grove Cement Co. violates Section 5 of the Federal Trade Commission Act, as amended."[61] The Order will be modified accordingly.

IV

In the notice of contemplated relief issued with the Complaint in this matter, the Commission sought to provide for divestiture of the challenged acquisitions, together with the imposition of a limited-duration ban on any further acquisitions of ready-mixers by respondent. The Administrative Law Judge, in rendering his Initial Decision, augmented these provisions with: (i) a post-divestiture limitation on respondent's sales of portland cement to the divested

[59] We note that in *Brown Shoe Co.* v. *United States*, 370 U.S. 294 (1962), one of the product lines in which a violation was found to have occurred involved only 1 percent foreclosure.

[60] Unlike the portland cement and ready-mixed concrete markets, in which "Union Quarries" has no discernible effect, there is no "portland cement treated base rock" market described in these proceedings; nor is there sufficient data to analyze "Union Quarries" in terms of backward integration by a ready-mixer into aggregates supply.

[61] Because of our disposition of this acquisition on the merits, it is unnecessary to pass on respondent's jurisdictional contentions. We note, however, that the Commission's power to challenge non-corporate acquisitions under Section 5 is well-settled. *Dean Foods Co.*, 70 F.T.C. 1146 (1966); *National Tea Company*, 69 F.T.C. 226 (1966); *Beatrice Foods Co.*, 67 F.T.C. 473 (1965); *Foremost Dairies, Inc.*, 52 F.T.C. 1480 (1956). Its Section 5 power to order divestiture is equally clear. *L. G. Balfour Co.* v. *FTC*, 442 F.2d 1 (7th Cir. 1971); *Golden Grain Macaroni Co.* v. *FTC*, 472 F.2d 882 (9th Cir. 1972), *cert. denied*, 412 U.S. 918 (1973).

firms;[62] (ii) a moratorium on ready-mixed concrete sales or deliveries by respondent into the KCMA;[63] and (iii) a ban on respondent internally expanding, or in any sense operating, as a competitor in the ready-mixed market in the KCMA for at least two years after divestiture.[64] On appeal, respondent has objected to the inclusion of these three provisions in any final order we may issue here.[65]

We are unable to find an adequate basis in this record to justify these additional provisions.[66]

In support of limiting respondent's sales to Fordyce and Lee's Summit for a period following divestiture, counsel supporting the complaint argue that there has been a prolonged "block-out of competitive effort"[67] in portland cement sales to the acquired ready-mixers. Simple divestiture will not be sufficient, so the argument runs, to eliminate the foreclosures which have long been maintained, and reinforced, by trading habit as well as corporate structure. This argument is not unreasonable on its face; and, indeed, it

[62] Initial Decision at 31 (Para. V).

[63] *Id.* at 32 (Para. VI). The Law Judge would order that this restriction, as well as that contained in Para. V, be maintained for two years after divestiture, or so long as respondent retains a security interest in the divested property, whichever is longer.

[64] *Id.* (Para. VII).

[65] Respondent has also challenged that portion of Paragraph I of the Law Judge's Order which would require divestiture of the "Union Quarries" assets. In light of our disposition of that aspect of this case, *supra*, respondent's objection to Paragraph I is moot. That portion of Paragraph I relating to "Union Quarries" is not made a part of our final order.

[66] In *Papercraft Corp.* v. *FTC*, 472 F.2d 927 (7th Cir. 1973) the Court of Appeals pointed out that while ". . . divestiture orders have included special provisions designed to insure the survival of the divested business, . . ." it is "essential" that such orders be based upon supporting findings which demonstrate ". . . the need for a special protective provision." (citation omitted) *Id.* at 931-32. We are unable to glean such findings from the record before us.

[67] Transcript of Oral Argument at 54.

may be compelling in other market contexts — or on a stronger record demonstration of necessity. We think, however, in the case of a homogeneous product such as portland cement, in a market admitted to manifest price competition, there appears little reason to foreclose respondent from any segment of that market. In this context, customers, even those newly severed from a parent, can be expected to buy from the supplier making the best price and offering the best service. Without a clear showing that this is not likely to occur in absence of the proposed competitive restriction, we are unwilling to order it here .

The argument advanced for keeping respondent out of the KCMA ready-mixed market for a time is equally unpersuasive. When asked during oral argument to cite record evidence justifying the competitive prohibitions of paragraphs VI and VII of the Law Judge's Order, counsel supporting the complaint could allude only to testimony of ready-mixers to the effect that a vertically integrated competitor puts an "independent" at a competitive disadvantage. While we receive such testimony as credible, we fail to see how it renders the order provisions in question in any way related to the offenses found. More importantly, we are simply at a loss to discern what relationship these provisions could bear to restoring the state of competitive vigor the market might have enjoyed but for the illegal acquisitions.

In the instant case we conclude that paragraphs V, VI and VII of the Administrative Law Judge's order, on the record before us, have not been demonstrated as necessary to effectuate relief in this matter. Accordingly, these provisions are not made a part of our final order.

V

It remains for us to dispose of respondent's contention that the issues in this case were prejudged by the Commis-

sion in "an unauthorized trade regulation rule proceeding." In what must be considered a gross misconstruction of the Commission's involvement in the cement industry,[68] respondent raises the question of prejudgment for our consideration yet a third time. Respondent puts forth no new argument to convince us that the Commission erred in deciding "prejudgment" in its Interlocutory Opinion and Order in this matter, October 14, 1969.[69] Nor has any reason been suggested for abandoning the Commission's subsequent determination in response to respondent re-raising the issue, along with its ill-conceived *"ultra vires"* argument, December 5, 1972.[70] Finally, there is absolutely no indication that the current Commission, or any of its membership, has prejudged any issue in this case or shown bias in any way since the issue was last resolved. In short, the respondent's contentions as to prejudgment and Commission bias were baseless when previously adjudicated, and they are baseless now.

June 24, 1975

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[68] *See, e.g.,* Respondent's Brief on Appeal at 47-52, *passim.*

[69] *Ash Grove Cement Company,* 76 F.T.C. 1076 (1969).

[70] *Ash Grove Cement Company,* 81 F.T.C. 1051 (1972).

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

COMMISSIONERS:

Lewis A. Engman, Chairman

Paul Rand Dixon

Mayo J. Thompson

M. Elizabeth Hanford

Stephen Nye

In the Matter of
ASH GROVE CEMENT COMPANY,
a corporation.

DOCKET NO. 8785

DISSENTING STATEMENT
OF
COMMISSIONER MAYO J. THOMPSON

Antitrust ranks alongside the flag, motherhood, and sliced bread in the national popularity sweepstakes and undoubtedly deserves much if not all of the vote of confidence it repeatedly receives in the opinion polls. Like all other good things, however, it can be overdone.

The Federal Trade Commission, understandably concerned with a large-scale merger wave that rolled across much of American industry in the boom years of the 1960's, developed a special concern with the way things were going in the concrete industry, the one that makes our building blocks and paves our roads. In brief, the FTC found that the major suppliers to this industry, the leading cement producers, were buying up all their customers, the

local ready-mix folks. Economists call such supplier-customer marriages "vertical integration" and worry about the possibility that, after two or three big cement firms have bought up all the ready-mixers in a particular town, price fixing will replace competition all along the line and the price of both cement and concrete will rise to inflated levels.

This is an understandable fear and I have no quarrel with the application of the principle in question to one of the acquisitions this agency has condemned today. Reviewing an order by one of our administrative law judges that would have required Ash Grove Cement to divest itself of three concrete firms it had bought up earlier in Kansas City, the Commission here decides that the acquirer can keep one of them but must give up the other two. The one it is permitted to keep is Union Quarries, a firm that makes roadbed concrete and uses, in its production of that product, less than 1% of the cement shipped into Kansas City each year. This amount, says the Commission, is *de minimis* and hence can't, as the statute requires, "substantially" lessen competition in any meaningful economic market. So far, so good.

And the Commission similarly kept its eye on the ball when it affirmed the trial judge's decision that Ash Grove must sell another of these three firms, Fordyce, a purchaser of some 10.2% of the cement shipped into Kansas City. One can hardly deny that, if each of the 4 largest cement firms doing business in a given city is allowed to buy a customer holding 10% of the local concrete market, other cement producers are going to be foreclosed from at least 40% of the total business in town and hence that one of the major arteries feeding into the competitive life-line of that particular market might well suffer some significant amount of clogging. Those are the kinds of numbers that can leave the competition gasping for breath.

My Brethren lose their grip on the realities of the com-

petitive arena, however, when they let their justifiable concern with the probable effects of such a substantial merger spill over onto the third one involved in this proceeding, Ash Grove's acquisition of a small ready-mixer called Lee's Summit. This two-plant operation was bought in 1966 for a price of $247,000 and accounts for 3.1% of the cement shipped into Kansas City. Its net profits in that year were, as the majority notes, $21,000.

Men of keener discernment than I may be able to see in these numbers a threat to the hydraulics of the Kansas City concrete market but, try as I might, I cannot make it out. To be sure, this market is already concentrated and the law is reasonably intended to deal not just with the kind of monopolization that leaps upon us in great bounds but the kind that enters in small increments and sneaks in on little cat feet in the middle of the night. But 3.1% of a market? While many economic phenomena — including monopoly pricing — are said to depend in the last analysis on events transpiring "at the margin," I cannot persuade myself that the Commission has not today shaved it all a bit too close. When the bologna is sliced so thin that it has only one side, there's not likely to be much nourishment in it. And if a profit of $21,000 on an investment of $247,000 represents the fruits of monopoly, then the latter is clearly an overrated grove.

One further point needs to be made here, the matter of allocating this agency's enforcement resources. The FTC's legal juggernaut has been rolling over these Kansas City transgressions for some six years now, a period longer than the one consumed by World War II. And while a substantial part of the $150,000 in attorney salaries that we have expended on this case to date would probably have been required in any event, surely a lesser sum would have been sufficient if we had elected to challenge only the key acquisition in the case, the one involving the 10% market share.

Nor is it an adequate answer to say that, whatever the wisdom of the choice we made in 1966, the costs associated with them are "sunk" now and thus should be ignored. Since there are no *additional* costs to our current budget in making this firm divest itself of two ready-mixers rather than one, the argument is naturally made that we have nothing to lose from making our divestiture order as comprehensive as the law will permit. Not so. Our staff uses our past decisions as guides to the kinds of cases it can expect us to look favorably on in the future. If we let this one pass without disapproval, more like it will surely appear on our calendar again. The final cost of today's decision is thus not the dollars that have been or will be spent on this particular matter but those that will be diverted away from more constructive areas in the years to come. The cost of what we do includes, as our economist friends have been telling us for years, the things our less productive expenditures have forced us to leave undone. The FTC is uniquely qualified, for example, to launch a sophisticated attack on what is clearly the single most damaging offense against the American consumer, price fixing by agreement among ostensible competitors.* Yet we have allocated a tiny percentage of our budget next year to this problem, a deficiency that stems not from the overall inadequacy of our total budget but from the priorities we set for the staff in our planning sessions and in the decisions we hand down in the routine course of business.

I will be departing from this agency soon. If I leave no other legacy here, I hope at least one idea I have advocated

* See, for example, my review of this problem in "Price Fixing, Consumer Injury, and the Regional Offices," June 28, 1974. As I noted there: "If we assume that these conspiracies raise prices by say 10% on the average — a figure that, again, seems fairly conservative in view of the 15% to 75% figures reported in the few case histories we have seen so far — then we are talking about an aggregate consumer loss here of some $10 billion or more per year." *Antitrust Law & Economics Review,* Vol. 7, No. 2 (1975), p. 96.

will survive, the notion that real economic benefits to the consumer, not legal indignation, will ultimately become the touchstone of our case-selection process. An antitrust case that doesn't promise lower consumer prices, as I have had occasion to say before, is like a cow that doesn't give milk and is too stringy to eat.

Again, I see no consumer nourishment in the divestiture of 3.1% of the Kansas City concrete market and would admonish the staff to strike such trivial issues from our future pleadings. This agency has the important responsibility of seeing that competition, the mother of all that gives vitality to the economy of a free nation, is not allowed to perish. With so solemn a duty to attend to, the talented and dedicated men who staff and lead the Federal Trade Commission cannot afford the luxury of picking economic daisies along the roadside. Alas, we have picked part of one today.

June 24, 1975

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

COMMISSIONERS:

Lewis A. Engman, Chairman

Paul Rand Dixon

Mayo J. Thompson

M. Elizabeth Hanford

Stephen Nye

In the Matter of
ASH GROVE CEMENT COMPANY,
a corporation.

DOCKET NO. 8785

CONCURRING STATEMENT

By Engman, Commissioner.

I agree that Ash Grove's acquisitions of Lee's Summit and Fordyce violate the Clayton Act, and I further believe the public interest requires a divestiture order. But I would not be so certain of the public interest if Ash Grove had succeeded in convincing me, as it attempted to do in its brief, that these mergers fostered price competition. As the Commission opinion recognizes, a vertical merger may foreclose a portion of a market, and it may give leverage to discipline unintegrated competitors. Yet a vertical merger may also, in some cases, bring desirable efficiencies to a stagnating market, or inject a dose of needed price competition, and I would be hard pressed to support a divestiture in such a case. While I do not consider Ash Grove's consumer benefit arguments to be irrelevant, I do consider them unpersuasive and I concur in the Commission decision.

June 24, 1975

UNITED STATES OF AMERICA

BEFORE

FEDERAL TRADE COMMISSION

DOCKET NO. 8785

IN THE MATTER OF:

ASH GROVE CEMENT COMPANY

ORDER

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

COMMISSIONERS:

Lewis A. Engman, Chairman

Paul Rand Dixon

Mayo J. Thompson

M. Elizabeth Hanford

Stephen Nye

In the Matter of
ASH GROVE CEMENT COMPANY,
a corporation.

DOCKET NO. 8785

FINAL ORDER

This matter having been heard by the Commission upon the appeal of respondent's counsel from the Initial Decision, and upon briefs and oral argument in support thereof and in opposition thereto, and the Commission, for the reasons stated in the accompanying Opinion, having denied, in part, and granted, in part, the appeal; accordingly,

I.

IT IS ORDERED that respondent, Ash Grove Cement Company, a corporation, and its officers, directors, agents, representatives, employees, subsidiaries, affiliates, successors and assigns, within one (1) year from the date this Order becomes final, divest, absolutely, subject to the approval of the Federal Trade Commission, all stock, assets, properties, rights and privileges, tangible and in-

tangible, including, but not limited to, all plants, equipment, machinery, inventory, customer lists, trade names, trademarks and goodwill, acquired by respondent, as a result of the acquisitions of the stock of Fordyce Concrete, Inc. and Lee's Summit Ready-Mix Concrete & Materials Company, together with all additions and improvements thereto and replacements thereof of whatever description, so as to assure that there is established one or more separate and viable competitors engaged in the business of producing and selling ready-mixed concrete.

II.

IT IS FURTHER ORDERED that pending such divestitures respondent shall not make or permit any deterioration or changes in any of the plants, machinery, equipment, buildings, or other property or assets to be divested which would impair their present capacity or market value.

III.

IT IS FURTHER ORDERED that none of the stock, assets, properties, rights or privileges required to be divested be transferred, directly or indirectly, to any person who is at the time of the divestiture an officer, director, employee, or agent of, or under the control or direction of, Ash Grove Cement Company, or any of its subsidiaries or affiliates or who owns or controls, directly or indirectly, more than one (1) percent of the outstanding shares of voting stock of Ash Grove Cement Company, or any of its subsidiaries or affiliates.

IV.

IT IS FURTHER ORDERED that with respect to the divestitures required herein, nothing in this Order shall be deemed to prohibit respondent from accepting consideration which is not entirely cash and from accepting and enforcing

a loan, mortgage, deed or trust or other security interest for the purpose of securing to respondent full payment of the price, with interest, received by respondent in connection with such divestitures; provided, however, that should respondent by enforcement of such security interest, or for any other reason, regain direct or indirect ownership or control of any of the divested plants, land or equipment, said ownership or control shall be redivested subject to the provisions of this Order, within one year from the date of reacquisition.

V.

IT IS FURTHER ORDERED that for a period of ten (10) years from the date this Order becomes final, respondent shall cease and desist from acquiring, directly or indirectly, without the prior approval of the Federal Trade Commission, the whole or any part of the share capital or other assets of any corporation engaged in the sale of ready-mixed concrete or concrete products within respondent's present or future marketing area for portland cement or which purchased in excess of 10,000 barrels or 1,880 tons of portland cement in any of the five (5) years preceding the merger.

VI.

IT IS FURTHER ORDERED that respondent shall, within sixty (60) days from the date of service of this Order, and every sixty (60) days thereafter until the divestitures are fully effected, and every one hundred eighty (180) days thereafter until it has fully complied with the provisions of this Order, submit to the Commission a detailed written report of its actions, plans, and progress in complying with the divestiture provisions of this Order, and fulfilling its objectives. All reports shall include, among other things that will be from time to time required, a

summary of all contacts and negotiations with any person or persons interested in acquiring the stock, assets, properties, rights or privileges to be divested under this Order, the identity of each such person or persons, and copies of all written communications to and from each such person or persons.

VII.

IT IS FURTHER ORDERED that respondent provide a copy of this Order to each purchaser of plants and assets divested pursuant to this Order at or before the time of purchase.

By the Commission. Commissioner Thompson dissenting.

SEAL

Charles A. Tobin
Secretary

ISSUED: June 24, 1975

ATTACHMENT: Dissenting Statement of Commissioner Mayo J. Thompson. Concurring Statement by Commissioner Engman.

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

COMMISSIONERS:

Lewis A. Engman, Chairman

Paul Rand Dixon

M. Elizabeth Hanford

Stephen Nye

In the Matter of
ASH GROVE CEMENT COMPANY,
a corporation.

DOCKET NO. 8785
ORDER DENYING PETITION
FOR RECONSIDERATION

Respondent Ash Grove Cement Company ("Ash Grove") has moved, pursuant to Section 3.55 of the Rules of Practice, for reconsideration of the Commission's Final Order and Opinion, dated June 24, 1975.

Section 3.55 provides that a petition for reconsideration ". . . must be confined to new questions raised by the decision or final order and upon which the petitioner had no opportunity to argue before the Commission."

Respondent claims that the Commission's order raises such a question:

> namely, conceding *arguendo* that Ash Grove's acquisition of Lee's Summit [Ready-Mixed Concrete & Materials Company] and Fordyce [Concrete, Inc.] violated the Clayton Act, whether an order of divestiture is appropriate and in the public interest in view

of substantial evidence in the record which shows that the challenged acquisitions resulted in consumer benefits in the form of lower prices and a vigorous enhancement of price competition in the sale of portland cement and ready-mixed concrete in the "Kansas City" area.

Respondent, however, had an opportunity, which it exercised, to argue before the Commission its claim that the acquisitions benefited consumers and enhanced price competition. See Respondent's Brief on Appeal at 30-38. The Commission ordered divestiture of Fordyce and Lee's Summit only after a full review of the record, including the extensive briefing and oral argument on appeal, and a consideration of all of respondent's contentions raised therein.

IT IS ORDERED that respondent's petition for reconsideration be, and it hereby is, denied.

By the Commission.

Charles A. Tobin
Secretary

ISSUED: September 9, 1975

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 75-3143

OPINION

ASH GROVE CEMENT COMPANY,

Petitioner,

v.

FEDERAL TRADE COMMISSION,

Respondent.

FILED MAY 23, 1978
EMIL E. MELFI, JR.
Clerk, U.S. Court Of Appeals

On Petition to Review an Order of the Federal Trade Commission

Before: CARTER and HUG, Circuit Judges, and HAUK,* District Judge.

JAMES M. CARTER, Circuit Judge:

This is a petition by Ash Grove Cement Company to review an order of divestiture and a cease and desist order issued by the Federal Trade Commission (FTC or Commission). The Commission issued the orders after adjudicating that Ash Grove had violated §7 of the Clayton Act by its acquisition of two ready-mix concrete companies. Ash Grove raises three contentions: (1) all of the material issues in the adjudicative proceedings were prejudged against Ash Grove in unlawful non-adjudicative agency proceedings; (2) the evidence does not support the Commission's finding that Ash Grove's acquisitions caused a

* Honorable A. Andrew Hauk, United States District Judge, Central District of California, sitting by designation.

lessening of competition; and (3) it was error for the Commission to order divestiture in the facts of this case. We AFFIRM.

I. *FACTS.*

Ash Grove is a major supplier and manufacturer of portland cement (hereafter "portland") which is the major and most expensive ingredient of ready-mix cement (hereafter "ready-mix"). Between 1961 and 1966 Ash Grove sold an average of about 400,000 barrels of portland annually in the Kansas City Metropolitan Area (KCMA). This amounted to between 13% and 18% of the total annual sales of portland in the KCMA. Most portland was sold to manufacturers of ready-mix.

On June 1, 1964, Ash Grove purchased 50% of the stock of Fordyce Concrete, a ready-mix manufacturer engaged in business in the KCMA since 1961. About two and one-half years later, on November 8, 1966, Ash Grove purchased the outstanding 50% of Fordyce stock, thereby obtaining 100% ownership. At that time Fordyce was the third largest ready-mix company in the KCMA, producing 14% of the local output. It was the largest independent ready-mix manufacturer; the two larger firms already had been acquired by other portland manufacturers.

In the early 1960's Ash Grove also acquired one third of the stock of Lee's Summit, another ready-mix manufacturer in the KCMA. On January 6, 1966, Ash Grove purchased the remaining two-thirds of the Lee's Summit stock. At that time Lee's was the seventh largest KCMA ready-mixer, with 4.3% of the total local output. In effect Ash Grove, through these two acquisitions, had acquired customer firms which, combined, represented nearly one-fifth of the KCMA ready-mix industry. The assets of Lee's were subsequently transferred to Fordyce through liquidation and the two companies were operated as one under the name "Fordyce-Summit."

At about the same time that Ash Grove was in the process of acquiring Fordyce and Lee's, the Federal Trade Commission conducted an investigation of the problem of vertical integration in the cement industry. In April, 1964, the FTC announced that due to the "growing importance and urgency" of the industry-wide trend toward integration of the cement industry, it would institute a trade regulation rule proceeding to organize and appraise "the general economic facts involving [the cement] industry and market structure . . ." *Permanente Cement Co.*, 65 F.T.C. 410, 494 (1964). On December 1, 1964, the Commission issued a minute order directing its Bureau of Economics to conduct the inquiry,

> ". . . *to obtain information* concerning such matters as the structure of the cement-producing and principal cement-consuming markets, the nature of the relevant product and geographic markets, the causes and business reasons underlying such acquisition and the probable effects of such acquisitions on competitive conditions of the market and industries involved *which may be of assistance to the Commission* in discharging its responsibilities to enforce the laws, in particular Section 7 of the Clayton Act, applicable to such acquisitions." *See FTC Economic Report on Mergers and Vertical Integration in the Cement Industry* at v (1966). (Emphasis added.)

After nearly two years of study the Bureau of Economics on April 4, 1966, transmitted to the Commissioners the staff report entitled *Economic Report on Mergers and Vertical Integration in the Cement Industry* (hereafter "Economic Report"). The Economic Report analyzed twenty-two target metropolitan areas, including the KCMA, to determine the extent and anticompetitive effects of vertical integration in the cement industry. No trade regulation rule was ever issued.

The Economic Report was the subject of public hearings in June 1966. On January 3, 1967, the FTC, based on

the report and the public hearings,[1] issued its *Enforcement Policy with Respect to Vertical Mergers in the Cement Industry* (hereafter "Enforcement Policy"). The Enforcement Policy concluded that vertical mergers in the cement industry, particularly those involving ready-mix companies, "can have substantial adverse effects on competition in the particular market areas where they occur." *Id.* at 2. Guidelines were promulgated to indicate which mergers the FTC would be likely to challenge. However, it was expressly stated that any enforcement proceedings would be judged on the basis of the facts presented in the individual adjudicative proceedings instituted.

On July 8, 1969, the FTC issued a complaint charging Ash Grove with violation of §7 of the Clayton Act, as amended, 15 U.S.C. §18, by its acquisitions of Fordyce and Lee's Summit.[2] Ash Grove admitted the acquisitions took place, but denied their illegality. Furthermore, Ash Grove claimed that its right to due process of law had been and would be further infringed because the major issues in the complaint allegedly had been prejudged by the FTC. A series of atempts by Ash Grove to have the complaint dismissed and to limit the proceedings were all unsuccessful. After extensive hearings[3] the administrative law judge

[1] The cement industry was active in response to the opportunity to comment through oral and written statements. Ash Grove itself was among the members of the industry participating.

[2] The complaint also alleged a violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. §45, because of Ash Grove's acquisition of assets from individuals which formerly had been a division of Union Construction Company of Kansas City, Missouri. The administrative law judge found this acquisition of Union's assets to violate Section 5 of the F.T.C. Act, but the Commission reversed his finding on appeal. This ruling by the FTC is not at issue in this appeal.

[3] As is true with many modern antitrust proceedings, the record in this case was voluminous. It consisted of 3546 pages of transcript, the testimony of 23 witnesses, 98 Commission exhibits and 107 exhibits by Ash Grove, excluding exhibits which were either rejected or withdrawn.

found in his Initial Decision filed September 23, 1974, that the challenged acquisitions were in violation of §7 of the Clayton Act.[4] A proposed order requiring divestiture was included with the decision.

On appeal the Commissioners entertained extensive briefing and oral argument, but ultimately issued an Opinion and Order on July 24, 1975, affirming the Initial Decision of the administrative law judge with modifications.[5]

The Commission's Order decreed that Ash Grove divest itself of all stock, assets and properties acquired as a result of the acquisitions of the stock of Fordyce and Lee's. Ash Grove filed a petition for reconsideration requesting that the remedy of divestiture be withdrawn. The petition was summarily denied and this petition for review followed.

II. *DUE PROCESS OF LAW.*

Ash Grove contends its constitutional right to due process of law was violated because the FTC's investigation of the cement industry and subsequent promulgation of the Economic Report and the Enforcement Policy (1) were without statutory authority, and (2) caused the Commission to

[4] The administrative law judge made 117 separate findings of fact. Generally, he found that portland cement and ready-mix concrete were proper lines of commerce within §7 of the Clayton Act; that the KCMA was the proper section of the country within which to evaluate the effects of the acquisitions; that the effects of the acquisitions are or may be: (1) foreclosure of competitors from a segment of the market otherwise open to them, (2) to increase concentration in an already heavily concentrated market, (3) to increase barriers to entry into the KCMA cement industry, and (4) to force existing competitors out of business. Ultimately, therefore, the administrative law judge found the effects of the acquisitions may be substantially to lessen competition in the manufacture and sale of portland and ready-mix in the KCMA, constituting a violation of §7 of the Clayton Act.

[5] One of the five Commissioners dissented in part from the decision and order of the Commission.

prejudge all the material issues involved in the adjudicative proceeding instituted against Ash Grove.

The heart of Ash Grove's contention that the FTC acted without statutory authority is that the Commission was engaged in rulemaking when it investigated the cement industry and promulgated the Enforcement Policy. Allegedly the Enforcement Policy is a "per se rule of illegality." According to the argument, §11(b) of the Clayton Act, which contains the statutory authority for the FTC to enforce §7 of the Clayton Act, restricts the agency to enforcement solely by adjudicative procedures. Thus, Ash Grove maintains, the FTC was not statutorily authorized either to investigate the cement industry through a trade regulation rule proceeding or to issue a rule based thereon.

Ash Grove is mistaken both as to its allegation that the Enforcement Policy constitutes a "rule" and as to its contention that the FTC cannot conduct investigations in the form of trade regulation rule proceedings. First, neither the Economic Report nor the Enforcement Policy were issued as trade regulation rules. Trade regulation rules, once found applicable to a partticular adjudicative issue, are binding on the parties involved. *See* 16 C.F.R. §1.12(c). *See also Gifford-Hill & Company, Inc. v. F.T.C.*, 389 F. Supp. 167, 175 (D.D.C. 1974), *aff'd*, 523 F.2d 730 (D.C.Cir. 1975). Here the investigation was conducted in the form of a trade regulation rule proceeding, ostensibly with the intention of establishing a rule if feasible.[6] However, no rule was promulgated. The FTC Division of Industry Analysis of the Bureau of Economics conducted the investigation and issued a staff report to the Commission. The Commission then held public hearings on the Economic Report to afford the public an opportunity to comment. Referring specifically to the Economic Report the Commission assured that it constituted nothing more than a staff document which the Commission "has not approved, disapproved, or passed upon."[7] 31 Fed. Reg. 6285 (1966).

[6] The Chairman of the FTC informed Congress in February, 1966:

"The program for fiscal 1967 contemplates the promulgation of a trade regulation rule on some aspect of the merger problem in the cement industry. The target date for the promulgation of the rule is June, 1967." *Hearing Before the Subcommittee on Independent Offices of the Committee on Appropriations*, U.S. House of Representatives, 89 Cong. 2d Sess. at 383, 443 (Feb. 10, 1966). *See also* Statement of FTC Chairman, *Hearings on Independent Office Appropriations Before the Committee on Appropriations*, U.S. Senate, 89 Cong. 2d Sess., pt. 1 at 461-462 HR 14921 (May 12, 1966).

After the hearing on the Economic Report was held, at which Ash Grove submitted comment, the Commission issued its Enforcement Policy. This document also was not issued as a rule, but as an industry guide. Although the Commission specified in the Enforcement Policy generally which mergers and acquisitions it intends to challenge, specific care was taken to explain that the document was not binding on any party:

> "In view of its extensive activity in the application of Section 7 to forestall anticompetitive mergers, together with its understanding of prospective developments in cement manufacture and distribution, this Commission wishes to make abundantly clear insofar as possible, its future enforcement policy with regard to vertical mergers in the cement and ready-mixed concrete industries. In doing so it is expected that needless litigation may be forestalled. At the same time however it should be noted that *the issues in any proceeding instituted by the Commission will be decided on the merits of that case.*" *Enforcement Policy* at 8-9. (Emphasis added.)

In subsequent proceedings against various cement producers (including Ash Grove) the Commission has re-

[7] The Economic Report itself states at page vii that it is only a staff report which the Commission has not approved or disapproved. The Commission further emphasized this fact in its subsequent Notice in the Federal Register, 31 Fed. Reg. 7772 (June 1, 1966).

peatedly reiterated that its hearing examiners as well as the Commission itself are not bound by any of the conclusions in the Enforcement Policy and must base their decisions on the record of the individual enforcement proceedings at issue.[8]

The Enforcement Policy was created and published to increase the expertise of the Commission and to provide guidance for agency staff and industry members plus their counsel regarding the enforcement intention of the FTC with respect to the cement industry. As such it is not a trade regulation rule.

Second, Ash Grove is incorrect that the Commission was without authority to conduct investigations through the medium of a trade regulation rule proceeding and utilize the expertise and information obtained thereby in

[8] In its Order and Opinion Denying Motion to Dismiss the Complaint in this case, the FTC cited extensively from its earlier interlocutory opinion and order, issued February 6, 1967, in *Lehigh Portland Cement Company*, Docket No. 8680, *Marquette Cement Manufacturing Company*, Docket No. 8685, and *Mississippi River Fuel Corporation*, Docket No. 8657, 71 F.T.C. 1618, where after again explaining the nature of the Enforcement Policy as an industry guide, the Commission held:

> "In each case the burden of proving the allegations of the complaint remains with complaint counsel, and has in no degree been shifted to the respondents. In each case, adjudication by the hearing examiner and the Commission will be made on the record, in accordance with the Administrative Procedure Act. In each case, the hearing afforded the respondents will be full and fair, in the same measure as if no Enforcement Policy had been issued. If the Commission's expertise has been enlarged as a result of the general inquiry conducted by its connection with formulating the Statement of Enforcement Policy, that fact neither prejudices the respondents' rights nor constitutes any reason for dismissing these proceedings. Respondents are entitled to have their cases adjudicated by Commissioners with open minds, not empty ones. . . ." (71 F.T.C. 1619, 1621-22.) *See* Record, Volume III at 1366-67.

subsequent adjudicative enforcement proceedings.[9] The FTC is authorized to enforce §7 of the Clayton Act by §11(b) of the same act which provides in relevant part:

> "Whenever the Commission * * * shall have reason to believe that any person is violating or has violated any of the provisions of section 2, 3, 7 and 8 of this Act, it shall issue and serve upon such person and the Attorney General a complaint stating its charges in that respect, and containing a notice of hearing * * *
>
> * * * * *
>
> "If upon such hearing the Commission * * * shall be of the opinion that any of the provisions of said sections have been or are being violated, it shall state its findings as to the facts, and shall issue and cause to be served on such person an order requiring such person to cease and desist from such violations * * *."

Because this provision mentions only adjudication Ash Grove contends the FTC is prohibited from utilizing any supplemental procedures to facilitate its enforcement of the

[9] In *National Petroleum Refiners Assoc. v. F.T.C.*, 482 F.2d 672 (D.C.Cir. 1973), *cert. denied*, 415 U.S. 951 (1974), this same argument was made with respect to essentially identical language found in §5(b) of the Federal Trade Commission Act, 15 U.S.C. §45(b). There Judge Skelly Wright ruled for the District of Columbia Circuit that the Commission's broad rulemaking power does not stand isolated from the Commission's enforcement and law-applying role. He stated:

> ". . . Section 5(b) does not use limiting language suggesting that adjudication alone is the only proper means of elaborating the statutory standard. It merely makes clear that a Commission decision, after complaint and hearing, followed by a cease and desist order, is the way to force an offender to halt his illegal activities." *Id.* at 675.

Section 11(b) of the Clayton Act, relied upon by Ash Grove here, invokes the FTC's enforcement authority in virtually the same manner for the Clayton Act as Section 5(b) does for the F.T.C. Act. Except for changes necessary because of the difference between the two acts, the wording in both statutes is identical. Our holding today confirms that §11(b) of the Clayton Act was not intended to restrict the FTC's non-adjudicative investigative authority.

specified provisions of the Clayton Act. But while §11(b) refers only to adjudication as the means of enforcing the statute against specific violators, it does not use any limiting language suggesting that adjudication is the only proper method of elaborating the statutory standard. Nor does it in any way suggest that evidence or argument produced as a result of non-adjudicative procedures is inadmissible in adjudicative hearings. It merely provides that once a specific offender has been identified and the decision has been made to proceed against the offender, the proper procedure is adjudication, i.e., complaint, hearing, and a cease and desist order if justified.

Moreover, the Commission has explicit statutory authority to conduct investigations of individuals, corporations or industries to assist its enforcement of the acts which it administers. Section 6(a) of the FTC Act, 15 U.S.C. §46(a), provides:

> "The Commission shall also have power —
> "(a) To gather and compile information concerning and to investigate from time to time the organization, business, conduct, practices and management of any corporation engaged in commerce * * * and its relation to other corporations and to individuals, associations and partnerships."

Information gathered by the Commission under its broad investigatory powers can be used for a variety of purposes, including promulgation of new rules, reporting to Congress, disseminating economic knowledge to the public, or, as here, to prepare an economic survey or report to enable the Commission to better administer the statutes over which it has jurisdiction. In addition, factual material compiled by the agency may call its attention to situations which warrant an adjudicative enforcement proceeding. "In such a case, all information gathered through the many factfinding activities of the agency may be used as evidence, even if it was originally obtained for the purpose of making an economic or statistical study." Von Kalinowski, *Antitrust Laws and Trade Regulation* §86.01.

In reply Ash Grove appears to concede the authority of the FTC to investigate, but contends that investigations conducted through trade regulation rule proceedings are *ultra vires.*[10] We have found no authority for this novel proposition. Nothing in either the statute or the regulations prohibits the FTC from conducting investigations through authorized trade regulation rule proceedings. *See* 15 U.S.C. §46(a); 16 C.F.R. §§1.5, 1.6, 2.8. Once such proceedings are concluded the Commission can proceed to issue a trade regulation rule, can determine no rule is necessary and culminate its efforts, or, can simply issue a policy statement as an industry guide. *See generally* Von Kalinowski, *Antitrust Laws and Trade Regulation* §83.03 [2] [d]. We hold that the FTC's investigation of the cement industry through the medium of a trade regulation rule proceeding and its subsequent promulgation of a staff report and an industry guide were fully authorized by law.

Ash's final due process argument is that even if legally permissible, the FTC's prior exposure to the issues involved in this case through its investigation caused it to unlawfully prejudge the adjudicative proceeding below. Claims that an administrative agency is impermissibly biased because of its combination of investigative and adjudicative functions must overcome a presumption of honesty and integrity on the part of the decisionmaker. In the recent case of *Withrow v. Larkin*, 421 U.S. 35, 47 (1975), the Supreme Court ruled:

> "The contention that the combination of investigative and adjudicative functions necessarily creates an

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[10] In its reply brief Ash Grove goes to great length to distinguish between a "trade regulation rule proceeding" and a "pre-adjudicative complaint investigation", contending the former are *ultra vires* whereas the latter are permissible modes of enforcing the Clayton Act.

unconstitutional risk of bias in administrative adjudication has a much more difficult burden of persuasion to carry. It must overcome a presumption of honesty and integrity in those serving as adjudicators; and it must convince that, under a realistic appraisal of psychological tendencies and human weakness, conferring investigative and adjudicative powers on the same individuals poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented."

Ash Grove attempts to rebut this presumption by making a comparison between the complaint issued against it in 1969 and selected excerpts from the Report and the Enforcement Policy. The comparison shows that many of the facts reported by the staff in its Economic Report and some of the Commissioners' tentative conclusions reached in the Enforcement Policy were mirrored in the FTC complaint against Ash Grove. However, this does not show impermissible prejudgment. That facts revealed by the staff investigation subsequently formed a part of the foundation for an enforcement proceeding is to be expected. Indeed, one of the purposes of industry investigations is to provide the agency with increased expertise in administering the law by exposing it to the factual background of relevant industries against which to judge individual mergers and acquisitions.

Likewise, the fact that some of the Commissioners' conclusions expressed in the Enforcement Policy were mirrored in the complaint does not prove prejudgment.[11] The Enforcement Policy was openly cautious to phrase its conclusions tentatively. Even the portions used by Ash Grove in its point-by-point comparison show that the Commissioners expressly conceded the possibility that individual acquisitions or mergers might not violate the statutory standard. For example, the Enforcement Policy concludes: "The Federal Trade Commission has concluded that vertical mergers and acquisitions involving cement manufacturers and consumers of cement, particularly ready-mixed concrete companies, *can* have substantial adverse effects on competition in the particular market areas where they occur." *Enforcement Policy* at 2. (Emphasis supplied.)

[11] Note that four of the five members of the Commission who decided the Ash Grove case (including three of the four member majority) were not members of the Commission when the Enforcement Policy was developed.

Ash Grove maintains that the Commission cannot avoid the implication that it has unfairly prejudged all the material issues by self-serving statements that it will judge each case on its individual merits. However, we reiterate that the presumption favors the Commission and it is incumbent on Ash Grove to make a showing that undue prejudice did occur. The facts suggest otherwise. In its proceeding against Ash Grove the FTC did not rely solely or even primarily on the Economic Report or the Enforcement Policy to prove its case. Extensive independent evidence was introduced before the administrative law judge and was available upon review by the Commission.[12] In fact, reliance on the information and tentative conclusions reached in the Economic Report and Enforcement Policy alone could not support a finding of violation against Ash Grove. It was the burden of the FTC to make a specific showing with respect to the particular acquisitions subject to the complaint that they were likely to cause the proscribed effect. This showing was amply made.[13]

The issue here is not dissimilar to that in *F.T.C. v. Cement Institute, et al.*, 333 U.S. 683 (1948). There the Commissioner charged and after hearing determined that the respondents' use of a multiple basing-point delivered-price system in the cement industry violated Section 5 of

[12] *See* n. 3, *supra*.

[13] *See* Section III, *infra*.

the F.T.C. Act and Section 2 of the Clayton Act. On judicial review one of the respondents contended it did not receive a fair hearing before the Commission since the Commission was biased against the portland cement industry generally. Respondent noted that the Commission had, prior to the filing of its complaint, conducted an investigation resulting in the conclusion that "the multiple basing point system as they had studied it was the equivalent of a price fixing restraint of trade in violation of the Sherman Act," and that the Commission had reported this conclusion to Congress and the President. The Supreme Court "decide[d] this contention [of prejudgment] . . . on the assumption that such an opinion [of the illegality of multiple basing-point delivered-price systems] had been formed by the entire membership of the Commission as a result of its prior official investigations." *Id.* 333 U.S. at 700. The Court concluded, however, that the Commission had not so prejudged the issues as to impermissibly taint their action in the adjudicative proceeding. It was held not to be a denial of due process for the Commission to express an opinion on the legality of a particular trade practice and thereafter pass upon the lawfulness of the practice while sitting as judges during an adjudicatory proceeding:

> ". . . [no] decision of this Court would require us to hold that it would be a violation of procedural due process for a judge to sit in a case after he had expressed an opinion as to whether certain types of conduct were prohibited by law. In fact, judges frequently try the same case more than once and decide identical issues each time, although these issues involve questions both of law and fact. Certainly, the Federal Trade Commission cannot possibly be under stronger constitutional compulsions in this respect than a court." *Id.* 333 U.S. at 702-03.

Ash Grove has not overcome the presumption of fairness by the FTC in its adjudicative enforcement procedures.

III. *SUFFICIENCY OF THE EVIDENCE.*

Ash Grove next contends there has been an inadequate showing that its acquisition of Fordyce and Lee's Summit may substantially lessen competition in any section of the country. Section 7 of the Clayton Act provides:

> "No corporation engaged in commerce shall acquire . . . the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation . . . where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."

The scope of our review of factual findings made by the FTC is very narrow. Section 5(c) of the F.T.C. Act, 15 U.S.C. §45(c), mandates that "[t]he findings of the Commission as to the facts, if supported by the evidence, shall be conclusive." This statutory language has been judicially interpreted to confine the exercise of appellate review of agency factfindings to a determination whether they are supported by substantial evidence. "Findings of fact cannot and will not be set aside if the evidence in the record reasonably supports the administrative conclusion, even though suggested alternative conclusions may be equally or even more reasonable and persuasive. The findings must stand unless they were wrong, and they cannot be wrong — that is reversibly wrong — if substantial evidence supports them." *Colonial Stores Inc. v. F.T.C.*, 450 F.2d 733, 739-40 (5th Cir. 1971). *See also Carter Products, Inc. v. F.T.C.*, 268 F.2d 461, 495 (9th Cir. 1959), *cert. denied*, 361 U.S. 884 (1959).

Ash Grove responds with a detailed cite to its own exhibits to show that in 1967-68 (the two years immediately following the acquisition) competition continued to exist in the portland and ready-mix industries in the KCMA

notwithstanding its acquisition of Fordyce and Lee's Summit. But this evidence does not refute the Commission's findings for a variety of reasons.

Although Ash Grove is correct in maintaining the Commission has the burden of proving there was a reasonable probability that the disputed acquisitions would substantially lessen competition in the relevant produce and geographic markets, *U.S. v. E. I. duPont de Nemours & Co.*, 353 U.S. 586, 598 (1957), proof of an actual anticompetitive effect is not an essential ingredient of a Clayton Act §7 violation. Section 7 was adopted to arrest anticompetitive effects of market concentration in their incipiency:[14]

> "The core question is whether a merger may substantially lessen competition, and necessarily requires a prediction of the merger's impact on competition, present and future. [Citations omitted.] The section can deal only with probabilities, not with certainties. [Citations omitted.] And there is certainly no requirement that the anticompetitive power manifest itself in anticompetitive action before Section 7 can be called into play. If the enforcement of Section 7 turned on the existence of actual anticompetitive practices, the congressional policy of thwarting such practices in their incipiency would be frustrated." *F.T.C. v. Proctor & Gamble Co.*, 386 U.S. 568, 577 (1967).

It is for this reason that the Supreme Court has held post-acquisition evidence of the type urged on us by Ash Grove to be entitled to only "extremely limited" weight in tending to refute the anticompetitive probabilities of acquisitions challenged under §7. The Court recently stated:

> "In *F.T.C. v. Consolidated Foods Corp.*, 380 U.S. 592, 598, this Court stated that post-acquisition evidence tending to diminish the probability or impact of anticompetitive effects might be considered in a §7 case. [Citation omitted.] But in *Consolidated Foods, supra*, and in *United States v. Continental Can Co.*, 378 U.S. at 463, the probative value of such evidence was found to be extremely limited, and judgments against the Government were in each instance reversed in part because 'too much weight' had been given to post-acquisition events. The need for such a limitation is obvious. If a demonstration that no anticompetitive effects had occurred at the time of trial or of judgment constituted a permissible defense to a §7 divestiture suit, violators could stave off such actions merely by refraining from aggressive or anticompetitive behavior when such a suit was threatened or pending.
>
> Furthermore, the fact that no concrete anticompetitive symptoms have occurred does not itself imply that competition has not already been affected, 'for once the two companies are united no one knows what the fate of the acquired company and its competitors would have been but for the merger.' *FTC v. Consolidated Foods, supra* at 598. And, most significantly, §7 deals in 'probabilities, not certainties,' *Brown Shoe v. United States*, 370 U.S. at 323, and the mere nonoccurrence of a substantial lessening of competition in the interval between acquisition and trial does not mean that no substantial lessening will develop thereafter; the essential question remains whether the probability of such *future* impact exists at the time of trial." *United States v. General Dynamics Corp*, 415 U.S. 486, 504-05 (1974).

Ash Grove's post-acquisition evidence, even if believed, shows nothing more than that a quantum of competition remained in the KCMA cement industry after the acquisitions. This does not refute the government's extensive counterproof that anticompetitive effects were probable to occur and in fact actually did occur.

Moreover, the reliability of Ash Grove's post-acquisition evidence is questionable. At the hearing the Commission

[14] "Incipiency" in this context denotes "not the time the stock was acquired, but any time when the acquisition threatens to ripen into a prohibited effect." *United States v. du Pont de Nemours & Co.*, 353 U.S. 586, 597 (1957).

attorney exposed substantial discrepancies in the data on which Ash Grove's exhibits RX 19 and RX 25 were computed. Many of the remaining Ash Grove exhibits were derived from these two exhibits. The administrative law judge agreed to admit into evidence the two disputed exhibits and their progeny, but noted repeatedly his serious reservations about their probative utility, particularly for the post-acquisition years 1967-68. The highly substantial discrepancies in the reported data underlying these exhibits were never clarified. We will defer to the factfinder the determination of the weight and inference to be accorded such disputed evidence absent clear error.

Finally, perhaps the most compelling reason to reject Ash Grove's contention that the evidence is insufficient to support the Commission's findings is that Ash Grove's argument misconceives the nature of the substantial evidence standard. Even if we accepted Ash Grove's exhibits as reliable and agreed that a strong showing of no violation had been made, we must affirm the Commission if the record contains substantial evidence to support the Commission's findings. Here Ash Grove has made virtually no claim that the evidence presented to support the Commission's findings was insubstantial. Indeed such a contention would be frivolous. The FTC conducted hearings at which voluminous testimonial and documentary evidence was introduced by both sides. Extensive direct and circumstantial evidence in the record supports the conclusion eventually reached by the Commission. For all of the reasons stated above the Commission's findings and order must stand.

IV. *DIVESTITURE.*

Finally, Ash Grove contends it was error for the Commission to order divestiture because price competition appeared to increase with respect to both cement and concrete in 1967-68. Assertedly this proves that partial

integration was healthy for the cement and concrete industries. In addition, Ash Grove argues that the remedy of divestiture is the most drastic of all antitrust remedies and should be applied only when warranted by sound factual bases supported by economic theory.

Price competition was prevalent during 1967-68 in the cement and concrete industries in the KCMA, but was shown by the record to be the result of desperation attempts by independents to maintain a foothold in the increasingly concentrated markets. As substantial consumers of portland were bought up by the cement suppliers, the independents began to offer selective, often secret, price cuts to customers simply to avoid permanent withdrawal from the market.

Price competition in an unconcentrated market is indeed a sign of healthy competition. However, a brief flurry of price competition in a heavily concentrated market which has the effect and possibly the purpose of destroying independent competitors is not a sign of a healthy market. Once the independents are eliminated there is no guarantee of continued low pricing from the large integrated suppliers who have acquired captive consumers.

Moreover, as already explained, post-acquisition evidence of continued competition is not entitled to determinative weight because it does not show what kind of competition might have remained had there been no illegal acquisitions. Remaining vigor in an industry cannot immunize an acquisition if the trend in that industry is toward ever increasing concentration.[15]

[15] Ash Grove also implies that the fact that over ten years have elapsed since the acquisitions mitigates against the remedy of divestiture. But, "[t]hat is not the law; the passage of time *per se* is no barrier to divestiture of stock illegally acquired. *United States v. Du Pont*, 353 U.S. 586, 590; 366 U.S. 316." *United States v. Greater Buffalo Press*, 402 U.S. 549, 556 (1971).

We note in conclusion that there is a sound basis in precedent for the application of the remedy of divestiture. The Supreme Court in *U.S. v. duPont de Nemours & Co.*, 366 U.S. 316, 328-31 (1961) held:

> "It cannot be gainsaid that complete divestiture is perculiarly appropriate in cases of stock acquisition which violate §7. That statute is specific and "narrowly directed," *Standard Oil Co. v. United States*, 337 U.S. 293, 312 (1949), and it outlaws a particular form of economic control — stock acquisitions which tend to create a monopoly of any line of commerce. The very words of §7 suggest that an undoing of the acquisition is a natural remedy . . . Of the very few litigated §7 cases which have been reported, most decreed divestiture as a matter of course. Divestiture has been called the most important of antitrust remedies. It is simple, relatively easy to administer, and sure. It should always be in the forefront of a court's mind when a violation of §7 has been found."

There was no error in the Commission's order of divestiture against Ash Grove.

V. *CONCLUSION*.

The order of the Federal Trade Commission is affirmed.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ASH GROVE CEMENT COMPANY,

Petitioner,

v.

FEDERAL TRADE COMMISSION,

Respondent.

NO. 75-3143

ORDER

FILED JULY 13, 1978
EMIL E. MELFI, JR.
Clerk, U.S. Court Of Appeals

Before: CARTER and HUG, Circuit Judges, and HAUK, District Judge.

The panel in the above entitled case voted as follows:

Judge Hug voted to deny the Petition for Rehearing and to reject the Suggestion for Rehearing En Banc; Judge Carter and Judge Hauk voted to deny the Petition for Rehearing and recommended the rejection of the Suggestion for Rehearing En Banc.

The Petition for Rehearing and Suggestion for Rehearing En Banc was circulated to all active judges and no judge has voted for a rehearing en banc.

IT IS ORDERED that the Petition for Rehearing and Suggestion for Rehearing En Banc is rejected.

No. 78-418

In the Supreme Court of the United States

OCTOBER TERM, 1978

ASH GROVE CEMENT COMPANY, PETITIONER

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 35a-54a) is reported at 577 F. 2d 1368. The opinion and order of the Federal Trade Commission (Pet. App. 1a-32a) are reported at 85 F.T.C. 1123. Earlier opinions of the Commission (App., *infra*, 1a-5a) are reported at 76 F.T.C. 1076 and 81 F.T.C. 1051.

JURISDICTION

The judgment of the court of appeals was entered on May 23, 1978. The court of appeals denied a petition for rehearing on July 13, 1978 (Pet. App. 55a). The petition for a writ of certiorari was filed on September 12, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Commission's investigation of mergers in the cement industry and issuance of an enforcement policy statement relating to that industry amounted to a prejudgment of the issues or otherwise invalidated the Commission's decision in this subsequent merger case.

STATEMENT

1. In 1964 the Federal Trade Commission stated in an adjudicative opinion that it planned to institute a trade regulation rule proceeding[1] to study vertical acquisitions in the cement industry. *Permanente Cement Co.*, 65 F.T.C. 410, 494 (1964). The Commission then directed its Bureau of Economics to initiate an investigation to obtain information "concerning such matters as the structure of the cement-producing and principal cement-consuming markets, the nature of the relevant product and geographic markets, the causes and business reasons underlying such acquisition[s] and the probable effects of such acquisitions on competitive conditions of the market and industries involved * * *" (Pet. App. 37a).

Nearly two years later, based in part on information received from responses to compulsory process served on members of industry, the Bureau of Economics prepared a study entitled *Economic Report on Mergers and*

[1]The Commission's rules of practice in effect between 1963 and 1967 described trade regulation rules as "rules [that] interpret and inform businessmen of legal requirements applicable to the practices of a particular industry * * *." 16 C.F.R. 1.62 (1964). The rules of practice further provided that in connection with any trade regulation rulemaking proceeding the Commission "may conduct such investigations, make such studies, and hold such conferences as it may deem necessary." 16 C.F.R. 1.67 (1964).

Integration in the Cement Industry ("Economic Report"). The Commission published the study in April 1966 but explained that it neither "approved [n]or disapproved the matters contained in the report" (*id.* at viii). The Commission then held public hearings to afford interested persons an opportunity to express their views on the subject of vertical mergers in the cement industry. 31 Fed. Reg. 6285 (1966); 31 Fed. Reg. 7772 (1966). Oral and written statements from industry members, including petitioner, were received.

In January 1967 the Commission issued a statement entitled "Enforcement Policy With Respect to Vertical Mergers in the Cement Industry" ("Enforcement Policy").[2] That statement expressed concern about vertical mergers in the cement industry. It observed that members of the industry had requested the Commission to clarify the legal status of such mergers (Enforcement Policy at 1-2). The Commission concluded that, based on the information then available to it, acquisitions of ready-mix concrete companies by cement firms "*can have* substantial adverse effects on competition in the particular market areas where they occur." *Id.* at 2; emphasis added. The Commission notified the industry that it intended to challenge acquisitions that appeared to satisfy certain criteria set forth in the Enforcement Policy. The Commission made it plain, however, that any issues in a proceeding brought by it would be decided on the record in that case. *Id.* at 8-9; Pet. App. 38a.

2. In 1969 the Commission issued a complaint charging petitioner with violating Section 7 of the Clayton Act, 15 U.S.C. 18, by acquiring two Kansas City ready-mix

[2]No trade regulation rule was proposed or adopted by the Commission.

concrete companies and with violating Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, by acquiring certain assets owned by shareholders of one of the companies. Petitioner sought dismissal of the complaint on the theory that the 1967 Enforcement Policy statement amounted to a "trade regulation rule" that was beyond the authority of the Commission to promulgate.

The Commission declined to dismiss the complaint, observing that the "Statement of [Enforcement] Policy does not have the effect of a trade regulation rule, but is simply a guide intended to instruct the Commission's staff and industry members with respect to the enforcement intentions of the Commission." 81 F.T.C. 1051-1052; App., *infra* 1a-3a. Reiterating an assurance it had given in other cement merger proceedings, the Commission stated: "[i]n each case the burden of proving the allegations of the complaint remains with complaint counsel, and has in no degree been shifted to the respondents." *Ibid.*

An administrative law judge later sustained the charges of the complaint. The Commission affirmed the ruling of the administrative law judge with respect to the acquisitions of the ready-mix concrete firms and ordered divestiture (Pet. App. 1a-26a).[3]

3. The court of appeals affirmed the Commission's order. The court observed that petitioner had not contended that the evidence supporting the Commission's findings is not substantial: "Indeed, such a contention would be frivolous. The FTC conducted hearings at which voluminous testimonial and documentary evidence was

[3]The Commission reversed the administrative law judge's finding that the asset acquisition had significant anti-competitive effects (Pet. App. 17a-18a).

introduced by both sides. Extensive direct and circumstantial evidence in the record supports the conclusion eventually reached by the Commission" (Pet. App. 52a).

. Addressing the argument of petitioner that the Enforcement Policy statement is a "rule," the court concluded that the statement "was created and published to increase the expertise of the Commission and to provide guidance for agency staff and industry members plus their counsel regarding the enforcement intention of the FTC with respect to the cement industry. As such it is not a trade regulation rule" (Pet. App. 42a). The court also concluded that the Commission has authority to conduct investigations of possible violations of Section 7 of the Clayton Act "through the medium of a trade regulation rule proceeding" (Pet. App. 42a-45a). The court found nothing improper in the issuance of enforcement guidelines in light of the Commission's assurance that the views set forth in the guidelines are not binding on parties or the Commission and that issues raised in individual enforcement proceedings would be decided on the facts of record in those proceedings (Pet. App. 41a-42a).

ARGUMENT

The decision below conflicts with no decision of this Court or any court of appeals. The decision is correct, and further review in this Court is not warranted.

1. Petitioner's contention (Pet. 12-14) that the Commission was improperly influenced by an unauthorized trade regulation rule is insubstantial. The Commission did not resolve any issues in this case on the basis of a trade regulation rule. As its opinion demonstrates (Pet. App. 2a-17a), the decision rests on a detailed analysis of the evidence and an application of this Court's decisions under Section 7 of the Clayton Act.

Moreover, the Commission has not adopted any "rule" governing mergers in the cement industry. The Commission's Enforcement Policy statement was not intended to be a rule and has not been treated as such in the various adjudicative proceedings that the Commission has instituted against vertical acquisitions in the cement industry (Pet. App. 41a-42a n.8).[4] The Enforcement Policy is nothing more than a public announcement of how the Commission plans to exercise its discretion to commence adjudicative proceedings. Any agency must have in mind some plan for allocating its scarce enforcement resources, and the plan does not become a prejudgment of particular cases just because it is announced to the public. In conducting a general investigation of vertical mergers in the cement industry and announcing an enforcement policy, the Commission was simply carrying out its statutory obligation "to develop that enforcement policy best calculated to achieve the ends contemplated by Congress and to allocate its available funds and personnel in such a way to execute its policy efficiently and economically." *Moog Industries, Inc.* v. *FTC*, 355 U.S. 411, 413 (1958).

Even if the Enforcement Policy were treated as a rule of some sort, that would not assist petitioner. Most litigated

[4]In support of its assertion that the Enforcement Policy statement is a "rule" which the Commission considers binding, petitioner refers to the fact that in other litigated cases involving vertical cement mergers the Commission has found violations. But those cases were adjudicated on full records, and the adequacy of the evidentiary showing of anticompetitive effect was affirmed in the cases that were appealed. *OKC Corp.* v. *FTC*, 455 F. 2d 1159 (10th Cir. 1972); *Mississippi River Corp.* v. *FTC*, 454 F. 2d 1083 (8th Cir. 1970); *United States Steel Corp.* v. *FTC*, 426 F. 2d 592 (6th Cir. 1970). These precedents simply show that meritorious complaints have been filed; they do not show reliance on a "rule" or "prejudgment" of any case.

cases are conducted against a background of legal rules that influence the outcome. In *United States* v. *Philadelphia National Bank*, 374 U.S. 321 (1963), for example, this Court established a number of legal principles that profoundly affected future horizontal merger cases. But the existence of those rules did not amount to "prejudgment" of any future case or disable the Court from deciding other bank merger cases. And so it is here. The Commission's use of an Enforcement Policy to summarize its experience with an industry and announce its concerns does not undermine the fairness of its decision-making process.[5] It is presumed that the agency will decide adjudicatory matters on their merits, and this presumption is not dissipated by a prior exposure to or discussion of the issues. *FTC* v. *Cement Institute*, 333 U.S. 683, 700-703 (1948). See also *Withrow* v. *Larkin*, 421 U.S. 35, 47-58 (1975).[6]

2. Petitioner's contention (Pet. 10-12) that the Commission lacks authority to conduct an investigation to facilitate its enforcement of the Clayton Act is frivolous. The Commission must be able to inform itself about conditions in an industry, or it could never decide which cases to prosecute. The Commission has explicit statutory

[5]As the Commission stated in its discussion of the Enforcement Policy statement: "Respondents are entitled to have their cases adjudicated by commissioners with open minds, not empty ones." *Lehigh Portland Cement Co.*, 71 F.T.C. 1618, 1622 (1967).

[6]If petitioner's "prejudgment" argument were accepted, it would be impossible for the Commission to issue a complaint and subsequently determine the merits in a Section 7 case, both of which Congress has required it to do. See 15 U.S.C. 21(b).

authority to conduct investigations to assist in its law enforcement responsibilities.[7] And it has long been established that the investigative powers granted the Commission under the FTC Act are available to it in enforcing the Clayton Act. *Hunt Foods and Industries, Inc.*, v. *FTC*, 286 F. 2d 803, 806-809 (9th Cir. 1960), cert. denied, 365 U.S. 877 (1961); *FTC* v. *Tuttle*, 244 F. 2d 605, 610-616 (2d Cir.), cert. denied, 354 U.S. 925 (1957); *FTC* v. *Reed*, 243 F. 2d 308, 309 (7th Cir.), cert. denied, 355 U.S. 822 (1957).

But however that may be, the Commission's order in this case was issued at the conclusion of evidentiary hearings in which the Commission's counsel sustained the burden of proving a violation of the law. In these hearings, petitioner had all the procedural rights, including judicial review, that are afforded by the Commission's rules and the Administrative Procedure Act. Petitioner does not dispute here the correctness of the court of appeals' ruling that the Commission's decision rests on substantial evidence and complies with this Court's decisions under Section 7 of the Clayton Act. In these circumstances, even if the Commission lacked authority to undertake its prior investigation of the cement industry, its order would not be affected.

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[7]Section 6(a) of the Federal Trade Commission Act, 15 U.S.C. (1964 ed.) 46(a) provides:

> The Commission shall also have power –
>
> (a) To gather and compile information concerning, and to investigate from time to time the organization, business, conduct, practices and management of any corporation engaged in commerce * * * and its relation to other corporations and to individuals, associations and partnerships.

See also 15 U.S.C. (1964 ed.) 46(b).

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 1978

APPENDIX

ASH GROVE CEMENT CO.

Docket 8785. *Opinion and Order, Oct. 14, 1969*

ORDER AND OPINION DENYING MOTION TO DISMISS THE COMPLAINT

This matter is before the Commission upon the hearing examiner's certification of respondent's motion, filed September 16, 1969, requesting the Commission "to dismiss the complaint on the grounds that a fair trial of the issues has been made impossible by prejudgment on the part of the Commission."

Respondent contends that it will be unable to obtain a fair hearing and an impartial decision on the issues raised by the complaint because the Commission allegedly has already prejudged all or certain of the significant issues raised in the complaint in asserted contravention of the Commission's Rules of Practice, the Administrative Procedure Act, the Federal Trade Commission Act, the Clayton Act, and respondent's constitutional right to a fair hearing conducted according to the law.

Respondent states that the alleged prejudgment of the issues is demonstrated by reference to (1) the Commission's Enforcement Policy With Respect to Vertical Mergers in The Cement Industry, dated January 3, 1967; (2) the claimed adoption by the Commission of the staff Economic Report on Mergers and Vertical Integration in the Cement Industry, published in April of 1966; and (3) the Commission's asserted reliance upon the aforementioned Economic Report in certain prior adversary proceedings.

The issue raised by this motion is the same as that presented recently to the Commission in *Missouri*

Portland Cement Company, Docket No. 8783 (order and opinion issued August 13, 1969 [p. 1064 herein]). The Commission denied the request there and will do so in this matter for the same reasons. Respondent has made no showing in the references to the prior actions of the Commission in the cement industry to justify its charge that the Commission has prejudged the issues in this case. The courts have held that agencies are not disqualified by such prior investigations and reports. *Federal Trade Commission* v. *Cement Institute*, 333 U.S. 683 (1948); *Pangburn* v. *Civil Aeronautics Board*, 311 F. 2d 349 (1st Cir. 1962). Accordingly,

It is ordered, That respondent's motion to dismiss the complaint on the grounds of alleged prejudgment be, and it hereby is denied.

It is further ordered, That this proceeding be, and it hereby is, remanded to the hearing examiner for hearing.

APPENDIX

ASH GROVE CEMENT COMPANY

Docket 8785. Order and opinion, Dec. 5, 1972.

ORDER AND OPINION DENYING MOTION TO DISMISS THE COMPLAINT

This matter is before the Commission upon the certification of the administrative law judge, filed August 31, 1972, of respondent's motion to dismiss the complaint, filed August 16, 1972. Complaint counsel, on August 28, 1972, filed an answer in opposition to respondent's motion. The motion was certified to the Commission pursuant to Section 3.22(a) of the Commission's Rules of Practice.

In support of its motion respondent argues: first, that this proceeding is illegal because it is an attempt to implement and enforce the Commission's January 3, 1967, Statement of Enforcement Policy with Respect to Vertical Mergers in the Cement Industry which respondent claims is a "trade regulation rule" beyond the statutory authority of the Commission to promulgate; and, second, that by issuing this alleged "trade regulation rule" the Commission has prejudged the material issues and facts in this proceeding thereby rendering a fair trial herein impossible.

Respondent's first argument rests upon its assertion that our January 3, 1967, statement of Policy is a trade regulation rule. This assertion is incorrect. In an earlier interlocutory opinion and order, issued February 6, 1967, in *Lehigh Portland Cement Company*, Docket No. 8680, *Marquette Cement Manufacturing Company*, Docket No. 8685, and *Mississippi River Fuel Corporation*, Docket No. 8657, 71 F.T.C. 1618, we clearly indicated that that

Statement of Policy does not have the effect of a trade regulation rule, but is simply a guide intended to instruct the Commission's staff and industry members with respect to the enforcement intentions of the Commission. As we stated:

The Statement sets forth certain criteria which will be followed by the Commission in identifying those vertical acquisitions in the cement industry which will receive the Commission's immediate attention and, if the facts should so warrant, will result in the issuance of complaints challenging their legality. These criteria have been promulgated as part of a general *enforcement* policy for the guidance of the staff and of industry members and their counsel, who might otherwise be uncertain of the Commission's enforcement intentions in this area. The Statement pointedly emphasizes, however, that "the issues in any proceeding instituted by the Commission will be decided on the merits of that case." * * *

* * * * * * *

The Commission reiterates that the respondents in these cases have in no way been prejudiced by the Statement of Enforcement Policy issued on January 3, 1967. In each case the burden of proving the allegations of the complaint remains with complaint counsel, and has in no degree been shifted to the respondents. In each case, adjudication by the hearing examiner and the Commission will be made on the record, in accordance with the Administrative Procedure Act. In each case, the hearing afforded the respondents will be full and fair, in the same measure as if no Statement of Enforcement Policy had been issued. If the Commission's expertise has been enlarged as a result of the general inquiry conducted by it in connection with formulating the Statement of Enforcement Policy, that fact neither prejudices the respondents' rights nor constitutes any reason for dismissing these proceedings. Respondents

are entitled to have their cases adjudicated by Commissioners with open minds, not empty ones. * * * (71 F.T.C. 1619, 1621—22).

We see no reason to dwell upon respondent's second contention—alleged prejudgment on the part of the Commission because of the January 3, 1967 Statement of Policy. It already has been before us once before. *Ash Grove Cement Company*, Docket No. 8785 (opinion and order, October 14, 1969 [76 F.T.C. 1076]). Respondent ought not to have been permitted to raise it again. And, it certainly should not have been certified to the Commission. Respondent's argument is rejected for the reasons expressed in our previous opinion. Accordingly,

It is ordered, That respondent's motion to dismiss the complaint be, and it hereby is, denied.

It is further ordered, That this proceeding be, and it hereby is, remanded to the hearing examiner for further proceedings.

Commissioner MacIntyre concurring in the result.